

2005

The troubled intersection of the interests of Christ and commerce : appellate-court review of Virginia Sunday closing laws in historical overview through 1942

William Robert Vanderkloot

Follow this and additional works at: <http://scholarship.richmond.edu/masters-theses>



Part of the [History Commons](#)

Recommended Citation

Vanderkloot, William Robert, "The troubled intersection of the interests of Christ and commerce : appellate-court review of Virginia Sunday closing laws in historical overview through 1942" (2005). *Master's Theses*. Paper 1136.

This Thesis is brought to you for free and open access by the Student Research at UR Scholarship Repository. It has been accepted for inclusion in Master's Theses by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ABSTRACT OF THESIS

- (a) Exact thesis title.

THE TROUBLED INTERSECTION OF THE INTERESTS OF CHRIST
AND COMMERCE: APPELLATE-COURT REVIEW OF VIRGINIA
SUNDAY CLOSING LAWS IN HISTORICAL OVERVIEW
THROUGH 1942

- (b) Author's full name: WILLIAM ROBERT VANDERKLOOT.
(c) Degree for which written: Master of Arts in History.
(d) Institution to grant degree: University of Richmond, Richmond, Virginia.
(e) Year degree is to be granted: 2005.
(f) Thesis director's full name: John D. Treadway, Professor of History.

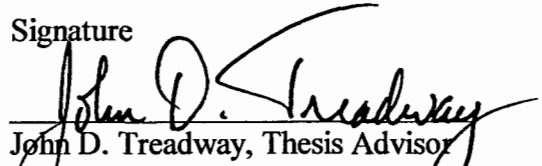
ABSTRACT

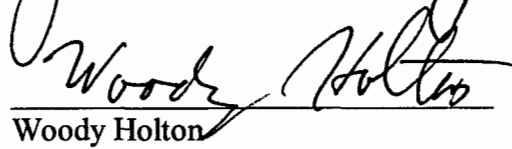
Virginia's Supreme Court of Appeals, between 1900 and the conclusion of this thesis in 1942, consistently narrowed Virginia's Sunday closing law, enacted in 1786 to prevent Sunday labor. While paying lip service to the statute's purpose, the court almost unhesitatingly chose statutory interpretations encouraging more Sunday labor, particularly by expanding its "necessity" and "charity" exceptions. The legislature also granted additional statutory closing law exceptions. This reflected the preferences of the public as well, which increasingly depended on the services of others laboring on Sunday. These results were also due, in part, to inherent confusions and contradictions in the law itself, as traced back through colonial Virginia, to Tudor England, and finally to the biblical origins of sabbath work bans. The relatively few closing law prosecutions undertaken as the midcentury approached, appeared largely motivated by business competitors, rather than by any concern for preventing Sunday labor.

THESIS ADVISOR APPROVAL PAGE

I certify that I have read this thesis and find that, in scope and quality, it satisfies the requirements for the degree of Master of Arts.

Signature


John D. Treadway, Thesis Advisor


Woody Holton

**THE TROUBLED INTERSECTION OF THE INTERESTS OF CHRIST
AND COMMERCE: APPELLATE-COURT REVIEW OF VIRGINIA
SUNDAY CLOSING LAWS IN HISTORICAL OVERVIEW
THROUGH 1942**

By

WILLIAM ROBERT VANDERKLOOT

B. A., University of Michigan, 1958

L.L.B., University of Virginia, 1961

A Thesis

Submitted to the Graduate Faculty

of the University of Richmond

in Candidacy

for the degree of

MASTER OF ARTS

in

History

August, 2005

Richmond, Virginia

**LIBRARY
UNIVERSITY OF RICHMOND
VIRGINIA 23173**

**THE TROUBLED INTERSECTION OF THE INTERESTS OF CHRIST
AND COMMERCE: APPELLATE-COURT REVIEW OF VIRGINIA
SUNDAY CLOSING LAWS IN HISTORICAL OVERVIEW
THROUGH 1942**

August, 2005

©Copyright by William R. VanderKloot 2005
All Rights Reserved

Part III. PREFACE AND ACKNOWLEDGMENTS.

As a practicing attorney, undersigned long believed that many incidents of trials, including transcripts, could reveal a great deal of relevant information when keyed to an appropriate historical inquiry. The value of such testimony derives from its being under oath, subject to cross examination and penalties of perjury, and immediately recorded by a court reporter. Although opinions of appellate courts are frequently noted in history texts, they cover only the issues appealed. A great deal more about the era in which the trial occurred can sometimes be learned from actual testimony, covering subjects of great interest to historians, even though not examined by the appellate courts.

The *Francisco* trial analyzed in **Chapter 8** herein met the above criteria, when analyzed in conjunction with Virginia's Sunday closing law history. Briefing in appealed cases can also provide clues as to who did, or did not, propose arguments appellate court adopted, as occurred here. Such considerations were in addition to the more conventional library research and examination of original documents also undertaken for this project.

As to citation of legal materials in this thesis, *The Bluebook: A Uniform System of Citation* (18th ed., 2005), developed by the major law reviews, was the standard followed. It generally requires that state court case citations be only to "the regional reporter for the region in which the court sits," Blue Pages portion, B5.1.3(v), page 9, *ibid*. These "regional reporters" were begun by the West Publishing Company (now part of the Thompson-West concern). All Virginia appellate opinions since 1887, for instance, are in the "South Eastern" Reporter (*Bluebook*, *supra*, Table 1, p. 237), abbreviated "S.E.," followed by a second

series of more recent opinions to date, abbreviated “S.E. 2d.” There are similar abbreviations for other regional reporters throughout the nation, as provided in the *Bluebook*.

This thesis attempts, as fully as possible, to follow the *Bluebook*. However, being a historical study, rather than a legal one only, it was deemed appropriate to also include the so-called “official” reports of each state appellate court cited, along with the regional reporter. This was because, for historical purposes, it may be important to study the “official” state court reports, rather than the national reporter system (an example is in thesis **Chapter 7**, n. 72 herein).

Many court opinions discussed herein were published before the national reporter system, so they can only be found in the official reports. This is also why official reports are cited for every thesis case, since many could only be located that way in any event. Case quotations are cited to relevant pages of the official report, if applicable, in either the United States Supreme Court Reports or Virginia cases. In non-Virginia state cases, quotations are cited to the official report if only that is available or to the regional reporter system only, if that is available. Consistent with the *Bluebook*, the terms “page,” “p.,” or similar references for pages are not used, except where needed to avoid confusion because of other reference numbers also identifying the document. The highest Virginia court, the “Virginia Supreme Court,” was once called the “Virginia Supreme Court of Appeals.” For reasons explained in this thesis, **Chapter 2**, footnote 10, that court is described herein as the “Virginia Supreme Court,” except where the older name is quoted. Following the *Bluebook*, when the first letters of “Court” or “Supreme Court” are capitalized, that reference is always to the United

States Supreme Court.

A work of this type cannot be accomplished without assistance from others. The only difficulty with naming some is the concern that names of others, equally helpful, have been inadvertently omitted. Subject to that qualification, the following are especially remembered: Joseph D. Kyle, Ph.D., Coordinator of Education Service and Grants for the Hanover Tavern Foundation, was extremely helpful in suggesting those in the Hanover area familiar with the 1941 *Francisco* trial. Through his suggestions Mr. Sumpter Priddy, son of the late, identically-named Sheriff, in office during the *Francisco* trial, was located. The younger Priddy supplied an informative letter attached to the thesis as **Exhibit "H,"** and many keen observations about the thesis subject matter, all extremely appreciated. The unparalleled assistance of Hanover County Deputy Clerk Thomas Carlson, head of the County Clerk's Office criminal division, is highly appreciated as well as the personal approval for that assistance by the Honorable Frank D. Hargrove, Jr., Hanover County Clerk, further detailed in **Chapter 8**, n. 2. Invaluable help also was supplied by the Library of Virginia.

At the University of Richmond, diligent help was rendered in locating documents, books, periodicals, and interlibrary loans. Mr. Keith Weimer, the highly competent government information specialist at the University's Boatwright Memorial Library, searched for obscure documents with an intensity making it seem his life depended on it, which was more than appreciated. Mr. James E. Gwin, Collection Librarian at Boatwright, offered encouragement and excellent advice. Assistant History Professor A.H. ("Woody") Holtón, a very quick study, supplied consistently insightful suggestions of pertinent courses of action in this

thesis. His laser-like analysis of the text improved its professionalism immeasurably. The value of his contributions were beyond price. Formal approvals being obtained for thesis materials from the Virginia Historical Society and the Historical Society of Western Virginia in Roanoke are also much appreciated.

From the inception of entry into the graduate program in history at the University of Richmond, undersigned has appreciated the consistent support, insight and academic inspiration provided by faculty advisor John D. Treadway, Professor of History. He has been unfailing in encouraging academic initiative well-grounded in underlying scholarship and generates academic enthusiasm among those attending his classes and seminars. Undersigned's progression in the program has benefitted greatly from his encouragement.

At home, undersigned's spouse, Keitha VanderKloot, when we arrived in Richmond in 1999, opined that after talking about history for over twenty years it was high time to begin a formal study of it. It was at her suggestion and with her encouragement that undersigned's graduate study was undertaken. Love and appreciation for her encouragement of this very worthwhile experience is here expressed as well. For these reasons, this thesis, also subjected to her legal-secretarial proof-reading exactitude, is dedicated to her as well.

Respectfully submitted,

William R. VanderKloot

Dated: July 1, 2005

Part IV. TABLES OF CONTENTS WITH PAGE REFERENCES

Table of Contents for Preliminary Matters

	<u><i>Preliminary Matters</i></u>
	<u><i>Page Numbers</i></u>
I. Title Page	i
II. Copyright Notice	ii
III. Preface and Acknowledgments	iii
IV. Tables of Contents with Page References	vii
V. List of Abbreviations	xii

THESIS TEXT TABLE OF CONTENTS

	Page Numbers
Chapter 1. INTRODUCTION.	1
Chapter 2. <i>FRANCISCO v. COMMONWEALTH</i> APPELLATE OPINION STUDIED, TO FRAME CLOSING LAW ANALYSIS IN THIS THESIS.	3
Chapter 3. OVERVIEW OF DEVELOPING A SEVEN-DAY “WEEK,” INCLUDING CHANGING THE CHRISTIAN SABBATH TO THE FIRST DAY OF THAT WEEK.	9
(a) Development of the Seven-day week.	9
(b) Christians Move Sabbath Worship to the First Day of the Week.	13
Chapter 4. IMPACT OF THE ENGLISH REFORMATION ON SUNDAY LAWS, BOTH IN ENGLAND AND IN COLONIAL VIRGINIA.	19
(a) The Henrician Church Confiscation and its Closing Law Impacts.	19

	(b) Sabbath Sanctification by Law in Colonial Virginia.	25
Chapter 5.	THE REVOLUTION AND VIRGINIA'S SUNDAY CLOSING LAWS.	37
	(a) The Voiding of Colonial Sunday Closing Laws Immediately After the Commencement of the American Revolution.	37
	(b) Post-Revolutionary Enactment of a Virginia Sunday Closing Law.	41
	(c) Complexity of Church/State Interrelation Attitudes in Virginia and America in the Immediate-Post-Revolutionary War Era.	48
	(1) Judicial Assertion of America as a "Christian" Nation.	49
	(2) Tripoli Treaty: America Not "Founded on the Christian Religion."	52
	(3) Possible Reconciliation of Jefferson's Seeming Inconsistencies Concerning Government and Religion.	59
Chapter 6.	SUNDAY CLOSING LAWS IN THE NINETEENTH CENTURY.	68
	(a) Sunday Closing Law's Nineteenth Century Impact on Liability Arising from Sunday Contracts or Negligence.	68
	(1) Representative State Courts Outside Virginia Denying Liability Due to Sunday Closing Law.	68
	(2) Representative State Courts Outside Virginia Retreating From Denying Liability Due to Sunday Closing Laws.	72
	(b) An Unsuccessful Attempt to Escape Sunday Liability Through the Virginia Sunday Closing Law.	75

Chapter 7.	VIRGINIA’S CLOSING LAW ENTERS THE TWENTIETH CENTURY.	83
(a)	Closing Law Appeals Through the Conclusion of the First World War.	83
(b)	Virginia Closing Law Appeals After World War I until July 1942.	88
(1)	<i>Religious Herald</i> Discussion of Rest on Sunday.	89
(2)	<i>Pirkey Brothers v. Commonwealth</i>: Cave Viewing on Sunday?	91
(3)	<i>Lakeside Inn Corp. v. Commonwealth</i>: Swimming on Sunday?	106
(4)	<i>Crook v. Commonwealth</i>: “Play Ball” on Sunday?	113
(5)	<i>Williams v. Commonwealth</i>: Movies on Sunday?	119
(c)	Conclusions About Twentieth-Century Virginia Closing Law Appeals Before <i>Francisco</i>.	125
Chapter 8.	REVISITING <i>FRANCISCO</i> v. <i>COMMONWEALTH</i> - THE TRIAL.	134
(a)	Introduction.	134
(b)	<i>Dramatis Personae</i> and Similar Matters in <i>Francisco</i>.	134
(1)	Transcript and Court Record.	134
(2)	The Prosecutor: Attorney Edward F. Simpkins, Jr.	135
(3)	The Defendant: M. G. Francisco.	135
(4)	The Newspapers.	138
(5)	The Judge: Honorable Leon M. Bazile.	139

(6)	The Defense Counsel: George Haw and Andrew Ellis.	143
(7)	The Sheriff: Sumpter Priddy.	144
(8)	Summary of “<i>Dramatis Personae</i>”	152
(c)	More Detailed Examination of Witness Testimony.	155
(1)	Witness William J. Nichols.	155
(2)	Other Complaining Witnesses.	156
(3)	Other Merchant Witnesses.	157
(4)	R. K. Turner, ABC Inspector.	158
(5)	The M. G. Franciscos, Husband and Wife.	159
(6)	C. W. Taylor, Clerk, Hanover County Board of Supervisors.	160
(7)	The Sheriff: Sumpter Priddy.	162
(d)	The Judge’s <i>Francisco</i> Closing Law Ruling.	164
(e)	Judge Bazile’s January 19, 1942, “Opinion of the Court” and its Treatment by the Virginia Supreme Court.	170
(f)	Epilogue — End of the <i>Francisco</i> Prosecution.	177
(g)	Concluding Comments on <i>Francisco</i>.	178
Chapter 9.	CONCLUDING ANALYSIS AND OBSERVATIONS.	184
	BIBLIOGRAPHY.	213
	BIOGRAPHICAL INFORMATION.	230
	SIGNATURE PAGE.	231

APPENDIX —ATTACHED EXHIBITS

First Page of Discussion in Text

Ex. Description

ALL PHOTOREDUCED, EXCEPT EXHIBIT "F-1"

"A"	Motion Picture Announcement: <i>Breathless</i> , Jean Harlow & William Powell, Roanoke, Virginia (1935).	119, n. 110
"B"	Photograph, Lakeside Inn pool and patrons, Roanoke, Virginia, in the 1920s.	131, n. 141
"C"	M.G. Francisco v. Commonwealth, <i>Petition for Writ of Error</i> [by Defendant], filed September 16, 1942, Virginia Supreme Court [<i>"Petition"</i>].	135, n. 3
"D"	M.G. Francisco v. Commonwealth, <i>Brief on Behalf of the Commonwealth</i> , filed October 8, 1942, Virginia Supreme Court.	135, n. 4
"E"	Hanover Circuit Court, Common Law Order Book No. 19, page 214, Appointment of Joseph Johnson as County Supervisor, December 30, 1941.	138, n. 3
"F"	November 20, 1941, Draft Hon. Leon M. Bazile letter to Attorney General (hand written by the Judge).	141, n. 18
"F-1"	Typescript copy of above Exhibit "F" (tabbed under Exhibit "F", following that handwritten copy).	141, n. 18
"G"	Albert O. Boschen, Delegate, December 28, 1941, letter to Hon. Leon M. Bazile.	143, n. 22
"H"	Author's April 16, 2002, letter to Sumpter Priddy, countersigned by him.	144, n. 24
"I"	Hanover County Criminal Docket, May 1942.	171, n. 106
"J"	Hanover Circuit Court, Common Law Order Book No. 19, Page 379. Edward Simpkins, Commonwealth Attorney, <i>Nolle Prosequi, Francisco v. Commonwealth</i> , September 20, 1943.	177. n. 125

Part V.

LIST OF ABBREVIATIONS.

Abbreviations

Full Title of Document

"Bazile Papers" or "Papers"

Leon Maurice [Nelson] Bazile Papers, 1826-1967, MSS1 B33483 a FA2 (Richmond, Va.: Virginia Historical Society, accessioned Dec. 14, 1987).

"Biographical Directory of Congress"

Joel D. Treese, ed., *Biographical Directory of the American Congress, 1774-1996* (Alexandria, Va.: CQ Staff Directories, Inc., 1997).

"Constitutional Interpretation"

Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (New York: John S. Voorheis, 1857).

"Constitutional Limitations"

Thomas M. Cooley, *Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*, 5th ed. (Boston: Little Brown, 1883).

"Hening"

William Waller Hening, ed., *The Statutes at Large; being a Collection of the Laws of Virginia, from the First Session of the Legislature in the Year 1619, Published Pursuant to an Act of the General Assembly of Virginia*, 13 vols. (Various publishers, 1819-1823; Reprint, Jamestown Foundation of the Commonwealth of Virginia by Univ. Press of Virginia, Charlottesville, 1969).

(continued, next page)

(continued from previous page)

G. LIST OF ABBREVIATIONS. (continued)

Abbreviations

Full Title of Document

"Jefferson's Papers"

Boyd, Julian P., ed., *Papers of Thomas Jefferson*, 31 vols. as of 2004, covering through 1800. (Princeton: Princeton Univ. Press, 1950-).

"Johnson, *Annals*"

Johnson, Sen. Richard M., Chair, Committee on Post Offices and Post Roads, Report [on Sunday Observance and Delivery of Mail], January 19, 1829, 20th Congress, 2d Session, Senate Report No. 74, *The Debates and Proceedings in the Congress of the United States with an Appendix Containing Important State Papers and Public Documents and All the Laws of a Public Nature; . . . Index*, 42 vols. (Washington, D.C.: 1834-1856); Reprint, *Annals of America*, Mortimer J. Adler, ed. (Chicago: Encyclopedia Britannica, 1976), vol. 5.

"KJV"

The "*King James Version*" or "*Authorized Version*" of the Christian Bible.

"Madison Papers"

Robert A. Rutland and William M.E. Rachal, ed., *Papers of James Madison* (Chicago: Univ. of Chicago Press, 1973).

"Notes"

Jefferson, Thomas, *Notes on the State of Virginia* (1785) Frank Shuffleton, ed. (New York: Penguin Books, 1999) (paperback).

(continued, next page)

(continued from previous page)

G. LIST OF ABBREVIATIONS. (continued)

Abbreviations

Full Title of Document

"NRSV"

The *New Revised Standard Version* of the Christian Bible.

"PE"

Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans., Talcott Parsons (New York: Charles Scribner's Sons, 1958)

"Petition"

"Petition for Writ of Error [by trial-defendant Francisco]," filed September 16, 1942, M.G. Francisco v. Commonwealth, Record No. 2633 (Richmond: Virginia Supreme Court) [later opinion reported in 180 Va. 371 (1942)].

"Solberg"

Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977).

"State Papers"

Appendix, Debates and Proceedings in the Congress of the United States, containing Important State Papers and Public Documents and all the Laws of a Public Nature, 5th Congress (May 15, 1797 to March 3, 1799) (Washington, D.C.: Gales & Seaton, 1851), vol. 1.

THE TROUBLED INTERSECTION OF THE INTERESTS OF CHRIST AND COMMERCE: APPELLATE-COURT REVIEW OF VIRGINIA SUNDAY CLOSING LAWS IN HISTORICAL OVERVIEW THROUGH 1942.

Chapter 1: INTRODUCTION

Thomas Jefferson reckoned his drafting of Virginia's Bill for Establishing Religious Freedom ("Jefferson's Statute") among his three most outstanding achievements.¹ Virginia has continuously reenacted it in subsequent recodifications of its law.²

This study was initially undertaken to trace the impact of Jefferson's Statute on the history of Virginia appellate litigation. Review of the first hundred years of Virginia appellate opinions, however, revealed no reference to it, except *Perry v. Commonwealth*.³

¹ Jefferson's self-written epitaph: "Here was buried Thomas Jefferson, author of the Declaration of American Independence of the Statute of Virginia for religious freedom & father of the University of Virginia." Quoted in Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (New York: Oxford Univ. Press, 1970), 988, with a photograph, the third of four between 912-913, *ibid.*, of Jefferson's handwritten instructions, directing it contain "not a word more . . . because by these, as testimonials that I have lived, I wish most to be remembered." *Ibid.* See also *Rosenberger v. University of Virginia*, 515 U.S. 819, 822 (1995) (Jefferson viewed University of Virginia's founding "together with authorship of the Declaration of Independence and of the Virginia Act for Religious Freedom, *Va Code Ann* §57-1 (1950), as one of his proudest achievements. . .").

² Current statute: *Va. Code Ann.* (1950), §57-1 (1995 Repl. Vol.).

³ 44 Va. (3 Gratt.) 602 (1846). A convicted defendant objected to the trial court's admitting testimony of a prosecution witness who denied God punished perjury after death but, instead, did so, the witness said, during one's life. Defendant claimed the witness thereby expressed "religious opinions [that] disqualified him" from testifying. *Ibid.*, 603-604. Virginia's highest court disagreed, observing: "[Formerly] . . . one who did not believe in the Christian religion could not be a witness. . . . In Virginia, [this] . . . was wholly abrogated by our Bill of Rights, and the act for securing religious freedom, . . . [providing:] 'That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be (continued...)"

After *Perry*, Virginia appeals gave little consideration to Jefferson's Statute until litigation later arose concerning Virginia Sunday closing laws (i.e., proscribing Sunday labor or commerce) such as *Pirkey Bros. v. Commonwealth* in 1922,⁴ which declared: "[The Sunday closing law][⁵]. . . , cannot be enforced as a religious observance, as that is forbidden by our laws on the subject of religious freedom."⁶ *Pirkey's* discussion of the interplay between Virginia's closing laws and its religious freedom laws was incorporated by Virginia's high court into later closing law opinions in 1942⁷ and 1961.⁸ Thus the issues embodied in Jefferson's Statute first arose in a practical way in appellate review of Sunday closing laws and, accordingly, attention was redirected to this narrower topic.

³(...continued)

directed only by reason . . . , and not by force and violence'. . . . It was said that one who holds the proscribed opinions [here, denying that God punished perjury after death] has not the 'capacity' to testify But the [Virginia] Constitution says that religious opinion shall not lessen 'civil capacities' The only error . . . was in allowing the witness to be questioned . . . touching his religious principles. This being an error in favor of the [defendant] prisoner, the judgment must be affirmed." Ibid , 610-613. Thus, *Perry* held that Jefferson's statute prohibited inquiry into religious opinions of a prospective witness, when determining the competency of that witness to testify.

⁴ 134 Va. 713, 114 S.E. 769 (1922).

⁵ Then-codified in Virginia Code Ann. (1919) § 4570.

⁶ *Pirkey Bros.*, 134 Va. at 717 (emphasis added).

⁷ *Francisco v. Commonwealth*, 180 Va. 371, 376-377, 23 S.E 2d 234 (1942).

⁸ "[A] Sunday law enacted under the police power of the State for . . . a day of rest . . . , to prevent . . . debasement . . . from . . . labor, does not infringe upon the constitutional guarantee of religious freedom." *Mandell v. Haddon*, 202 Va. 979, 988, 121 S.E.2d 516 (1961), citing *Pirkey Bros.*, discussed further, *infra.*, at nn. 23 through 70, Chapter 7, *infra.*, and accompanying text.

Chapter 2: *FRANCISCO* v. *COMMONWEALTH* APPELLATE OPINION STUDIED, TO FRAME CLOSING-LAW ANALYSIS IN THIS THESIS

This thesis begins, and ultimately concludes, studying Virginia Sunday closing laws, their dynamics, development, and indications of their eventual quiescence; by examining the 1942 *Francisco v. Commonwealth*¹ opinion by Virginia's highest tribunal, the then-entitled Supreme Court of Appeals.² No claim is made for *Francisco* as pivotal, but it can be termed representative, both as an analytical starting point and as a means to examine social conduct, both unifying and divisive, embodied in the operation of Virginia's closing laws as revealed in appellate decisions through 1942, when this thesis concludes.

This **Chapter 2** examination of *Francisco* is confined to the December 7, 1942, text of the Virginia high-court's opinion (the "opinion" or "*Francisco*"). With that backdrop, succeeding **Chapters 3** through **7**, offer a more detailed study of Virginia Sunday closing laws, from their prehistory antecedents through 1942. References are also made to relevant developments outside Virginia, some much earlier than its colonial founding. With this detailed review in hand, the thesis returns to a more detailed examination of *Francisco* itself, in **Chapter 8**, considering matters not apparent from this **Chapter 2** review of the high-court

¹ 180 Va. 371, 23 S.E. 2d 234 (1942).

² Virginia's highest court, formerly the "Virginia Supreme Court of Appeals," now the "Virginia Supreme Court," retained its predecessors records. For consistency, "Virginia Supreme Court" is used herein to identify Virginia's highest court, except in quotations containing the other name. It is also used to avoid confusion, because there is now (circa 2005) a "Virginia Court of Appeals," an intermediate appellate court, unconnected with the old "Virginia Supreme Court of Appeals."

opinion alone. Finally, general conclusions about Virginia closing laws through 1942 are offered in **Chapter 9**.

Reading *Francisco* propels the imagination back to the early 1940s in Virginia's then-almost wholly bucolic Hanover County, just north of Richmond, the state capital. Major arterial highways interlaced the area, encouraging a substantial tourist business, supporting restaurants, gas stations and convenience stores. Their sales were of gasoline, drinks, including beer, and other goods, a significant portion of which occurred on Sunday,³ though ostensibly prohibited, at least in part, by the Virginia Sunday closing laws.

The defendant, M. G. Francisco, described as a "country merchant," operated a Hanover County general store. He sought to profit from the tourist traffic by selling on Sundays, among other things, beer for off-premises consumption, as did eighty percent of Hanover County businesses holding, as he did, a state license to sell beer.⁴ He was cited for violating Virginia's closing law, virtually unchanged since originally adopted by the first post-revolutionary war Virginia legislature in 1786,⁵ providing in pertinent part:

If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business except in household or other work of necessity or charity, he shall be deemed guilty of

³ Ibid, 373-374. The facts of *Francisco* here-stated are only those found in the December 7, 1942, Virginia Supreme Court opinion at 180 Va. 371. Other facts not in that opinion, are discussed in **Chapter 8** of this thesis.

⁴ *Francisco*, *ibid*, at 373-374. "No complaint was lodged against him [Francisco] for the sale of articles other than beer." *Ibid*, at 374.

⁵ The original 1786 statute is quoted in text preceding n. 20, **Chapter 5**, *infra*.

a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offense. . . .⁶

Hanover County Circuit Judge Leon M. Bazile presided at the *Francisco* trial.⁷ His “written opinion, made part of the record” in that trial, ruled that what was a Sunday “work of necessity,” exempted from prosecution, was a question of law for the court, not one of fact for the jury. He further held that the defendant’s alleged Sunday sale of beer could not, as a matter of law, be deemed a statutorily exempted “necessity.”⁸ He therefore “instructed the jury that if they believed . . . beyond a reasonable doubt that the defendant . . . maintained a business for the sale of beer and sold beer on the Sunday in question, they should find him guilty.”⁹ Since Mr. Francisco never contested these matters, the result was, said the *Francisco* opinion, given the judge’s jury instruction, “a verdict of guilty necessarily followed.”¹⁰ That is, the judge’s instruction effectively compelled the jury to find Mr. Francisco guilty merely because the sale occurred on Sunday. He barred the jury from considering whether there was an exculpatory “necessity” for the sale, precluding conviction.

⁶ Va. Code Ann. (1919) § 4570, quoted in *Francisco*, 180 Va. at 375.

⁷ *Francisco*, 180 Va. at 373.

⁸ Ibid, 180 Va. at 375. The Virginia Supreme Court here summarized, rather than quoted, the trial court’s ruling. The Supreme Court described the precise charge against defendant, as being his unlawful “laboring at his trade and calling by remaining open and maintaining a business for the sale of beer and by selling beer on Sunday.” Ibid at 373.

⁹ Ibid at 374.

¹⁰ Ibid.

Mr. Francisco's sentence was a five dollar fine, the statutory minimum.¹¹ His conviction, however, was overturned by the Virginia Supreme Court's December 7, 1942, *Francisco* opinion,¹² which assigned two reasons for its reversal:

First, the trial court erred in concluding "the sale of beer on Sunday, . . . was, as a matter of law, not a necessity. . . ." It was, said the Supreme Court, "for the jury and not the court to say whether such Sunday sale was or was not reasonably essential to the economic, social or moral welfare of the community [i.e., a 'necessity']".¹³

Second, said the high court, the trial judge erred in "excluding from the jury evidence that the [Hanover County] board of supervisors had considered and failed to enact an ordinance prohibiting the sale of beer on Sunday." This was "pertinent and material on whether the work of selling beer on Sundays was reasonably essential to the economic, social or moral welfare of the community [i.e., an exculpatory 'necessity,' precluding conviction]".¹⁴

¹¹ Ibid at 373. For the five dollar minimum fine imposed, refer to the last line of the statute as quoted in thesis text preceding n. 6, this **Chapter**, *supra*.

¹² *Francisco*, 180 Va. at 383. Three of the court's five judges joined in the *Francisco* opinion. The fourth concurred in result only and filed a short opinion. The fifth dissented but filed no dissenting opinion.

¹³ *Francisco*, 180 Va. at 380 (emphasis and bracketed words added). That is, the Supreme Court ruled, the jury could find, in its discretion, as a matter of *fact* (not law), that in this particular circumstance, a sale of beer was, or was not, a "necessity." Trial Judge Bazile, the high court effectively concluded, could not take that decision away from the jury.

¹⁴ Ibid at 381-382.

Thus ended *Francisco's* appellate record.¹⁵ This did not necessarily mean the lower-court retrial which *Francisco* also ordered did not occur, since a retrial, if not appealed, would not appear in any appellate record. However, given the defendant's appeal of his first conviction, he seemed unlikely to be any less inclined to appeal a later one. Conversely, given the prosecution's zeal, it also seemed unlikely to simply abandon what it had so vigorously pursued, even had there been an acquittal.¹⁶ Lack of further appellate proceedings was, therefore, puzzling.

Equally puzzling was why the County was prosecuting, given the high court's finding that "at least eighty percent of those licensed to sell beer [in the county]. . . sold it openly on Sundays."¹⁷ Paradoxically, local authorities were not prosecuting Sunday closing law violations by "eighty percent of those licensed to sell beer" who "sold it openly on Sundays," while relentlessly pursuing this one, seemingly minor, offender.¹⁸

¹⁵ 1 *Shepard's Virginia Citations* (1995), 703, reveals no further appellate activity.

¹⁶ A jury acquittal of defendant would prevent his retrial for the same offense, on double-jeopardy grounds; e.g., U.S. Const. amend. V, cl. 2. The prosecution, however, might have appealed alleged errors of law, even after acquittal, solely to establish favorable precedent, as suggested in a parenthetical phrase in the following quotation in *Commonwealth v. Perrow*, 124 Va. 805, 811, 97 S.E. 820 (1919) (dictum): "When the purpose of an appeal in a criminal case is to procure on behalf of the State a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision of the legal question involved for use as a precedent in future cases) the rule against a second jeopardy for the same offense . . . destroy[s] the right of appeal." Alternatively, a subsequent Sunday sale by this defendant could have been prosecuted.

¹⁷ *Francisco* at 374.

¹⁸ America's eminent entry into World War II also, arguably, should have redirected
(continued...)

Thus, the *Francisco* opinion, as outlined above, raised questions not answered by the facts and circumstances contained within the confines of its text. It was difficult to locate additional credible evidence for answers, as will be shown. Although, perhaps not enough was learned to reach unassailable conclusions, what was uncovered allowed some well-informed suppositions about why cases like *Francisco* arose under the Sunday closing laws, not only in Virginia, but elsewhere as well. To better understand what was learned, however, it is necessary first to examine the origins and development of Sunday closing laws, both in Virginia and elsewhere where relevant, from their earliest indications in Judeo-Christian history through the year-end-1942 conclusion date of this thesis.

¹⁸(...continued)

Virginia law enforcement attention, in general, towards matters like espionage, sabotage, treason and subversion, rather than the prosecution of (in 1941), and contesting the appeal of (in 1942) this relatively minor state Sunday closing law misdemeanor.

Chapter 3: OVERVIEW OF DEVELOPING A SEVEN-DAY “WEEK,” INCLUDING CHANGING THE CHRISTIAN SABBATH TO THE FIRST DAY OF THAT WEEK.

(a) Development of the Seven-Day Week.

An analysis of laws prohibiting labor on a day-certain (Sunday) within the seven-day week, is necessarily incomplete without first considering how the seven day week itself arose. This is because the closing law’s presumed impact partly depends on its undeviating recurrence within the week’s seven-day cycle. This **Chapter 3**, accordingly, also considers whether connections can be found between Sabbath requirements of rest and religious reflection and the origins of the seven-day week.

One scholar found the seven-day week’s origins a “mystery” whose roots “lie deep, too deep to fully understand.”¹ Another asserted, that “[w]hile various seven-day patterns were present in ancient Near Eastern texts, no [non-biblical] sabbath day or seven-day week or seven-day creation account has been discovered.”² Still others noted, however, that Babylonians, “rested on the fifteenth day of the month, the time of a full moon, [which] they called *shabuttu*, meaning ‘cease’ or ‘rest.’” Each “rest” day was called a “sabbath,” when work stopped for worship and celebration.³

¹ Witold Rybczynski, *Waiting for the Weekend* (New York: Viking Penguin, 1991), 49, citing numerous authorities for this conclusion in “Notes on Sources,” 238-239, *ibid*.

² Terence E. Fretheim “Commentary, Genesis 1:1-2:3, The Creation,” *New Interpreter’s Bible* (Nashville: Abington Press, 1994), 1:340-347, 346.

³ Hiley H. Ward, *Space Age Sunday* (New York: Macmillan, 1960), 55-56, citing Wilhelm P.F.F. Lotz, “Sabbath,” *New Schaff-Herzog Encyclopedia of Religious Knowledge*,

The Babylonians ultimately observed not merely one, but four rest days each month. Work ceased, “probably the first, eighth, fifteenth and twenty-second of the month.” Astrology convinced the Babylonians these days were ill-omened, except the mid-month full moon date, when they prayed to be saved from divine wrath on the other three.

Weekly “sabbaths” which were “ill-omened,” except at mid-month, seem the opposite of the uniformly exalted holy sabbath-day of biblical tradition. Israelites, exiled to Babylon when conquered by that Empire around 600 B.C.E., presumably learned there of such Babylonian “sabbaths.” Perhaps they concluded that whatever their Babylonian enemy feared, they should embrace,⁴ and thus saw these non-midmonth “sabbaths” as days of gladness and rest for Israel, not of penance or dread, as they were for the Babylonians.⁵

Samuel Macauley Jackson, ed., (New York: Funk & Wagnalls, 1911), 10:135-136.

⁴ This somewhat parallels the reputedly middle-eastern saying, “The enemy of my enemy is my friend,” as explained in *Oxford Dictionary of Proverbs*, 4th ed., Jennifer Speake, ed. (Oxford: Oxford Univ. Press, 2003), 90. Ward, 56, *ibid*, explained: “The sabbath of the Babylonians was for penance; while to the early Hebrews it was a day of gladness and rest.”

⁵ Ward, n. 3 (this **Chapter**), *supra*, at 56, supplied quotations and assertions in the text paragraph supported by this footnote and the paragraph immediately preceding; and insightfully noted bible texts attributing, presumably due to Babylonian influence, special significance to “new moon” and “Sabbath”: (1) A husband rebukes his wife (despondent over a son’s death) for consulting the prophet Elisha: “Why will you go to him today? It is neither new moon, nor sabbath.” 2 Kings 4:23; (2) The prophet Amos disdainfully “quotes” hypothetical greedy merchants: “When will the new moon be over, that we may sell grain; and the sabbath, that we may offer wheat for sale?” Amos 8:5 (NRSV). J. A. Soggin stated: “A connection [of “sabbath”] with the Akkadian [North Babylonian] *sab/pattu*, . . . should probably be rejected, as they are unpropitious days, the opposite of what the Sabbath seems to be. Nevertheless, the former connection is so obvious etymologically that one should ask whether the abstention from work on such a day does

While the foregoing possibly offers an archeological-historical explanation of Israel's adopting a seven-day week, the Judeo-Christian Bible attributed the week's origin to the Israelite deity's creative powers. In Old Testament-Genesis, God's acts of creation consumed six days and then, it was said, "God blessed the seventh day and hallowed it, because on it God rested from all the work that he had done in creation."⁶ Humankind, however, was not clearly instructed to hallow this seventh day until, we are told, God later said to Moses:

Six days shall work be done, but the seventh day is a sabbath of solemn rest, holy to the Lord; Therefore the Israelites shall keep the sabbath . . . as a perpetual covenant. It is a sign forever between me and the people of Israel that in six days the Lord made heaven and earth, and on the seventh day he rested, and was refreshed.⁷

Hiley Ward, asserted that "periods of fifty days, or 'pentecontads,' originated at the time of Moses [within which] . . . were seven weeks of forty-nine days, including seven sabbaths, with one extra [holy day]." Then "at a much later date, during the Babylonian captivity, . . . the pentecontad plan with its special 50th day was abandoned and a regular *invariable* seventh-day sabbath was introduced"⁸

not lead . . . to the Israelite concept of rest." Bruce M. Metzger and Michael D. Coogan, ed., *The Oxford Guide to Ideas & Issues of the Bible* (New York: Oxford Univ. Press, 2001), s.v., "Sabbath," 444.

⁶ Genesis 2:3, NRSV. The arguably incorrect "Old Testament" is used here, because its meaning is more widely understood in the vernacular, rather than the historically more correct but less-well-understood "Hebrew Bible."

⁷ Exodus 31:15-17, NRSV.

⁸ Ward, *Space Age Sunday*, 58 (emphasis in original), quoting from Elizabeth Achelis, *Of Time and Calendar* (New York: Thomas Nelson, 1955), 87, 88.

Still another origin for a “sabbath” or “rest” day was offered in the Old Testament

Book of Deuteronomy, saying Moses told the people of Israel:

Six days you shall labor and do all your work. But the seventh day is a sabbath to the Lord your God; you shall not do any work Remember that you were a slave in the land of Egypt, and the Lord your God brought you out from there . . . , therefore the Lord your God commanded you to keep the sabbath day.⁹

One commentator claimed this passage “subordinated” creation “to that of the exodus.” In contrast, another found “the fundamental sanction of the Sabbath in both statements is creation—in Exodus, of the world; in Deuteronomy, of a people.”¹⁰

The Old Testament thus required scrupulous observance of a weekly Sabbath. The Israelites believed this covenant with their God was “so important that penalties for disobedience were severe [death],” and that “desolation awaits the land that pollutes the Sabbath.”¹¹ The meaning of this theological imperative was clouded, however, by confusion over what was being observed. The “Sabbath,” as derived from Babylonian tradition was, somehow, transmogrified from a day, in the main, to be dreaded, into, in Israelite belief, one to be honored. Further, the biblical texts quoted also confused whether that observance honored God’s resting after six days of creation (Genesis/Exodus) or Israel’s escape from Egyptian

⁹ Deuteronomy 5:12-15, NRSV.

¹⁰ Walter Brueggemann, “Commentary, Exodus 20:8-11,” *New Interpreters Bible*, supra, n. 26, supra, 1:845, first quotation in the footnoted paragraph. The last quotation, comparing Exodus and Deuteronomy passages, was from Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977), 9.

¹¹ Ward, *Space Age Sunday*, 57. Solberg, 9, n. 9, and accompanying text.

slavery (Deuteronomy). These confusions seemed to carry over to its contemporary purposes and observances, as just discussed in **Chapter 2** herein, concerning *Francisco*.

(b) Christians Move Sabbath Worship to the First Day of the Week.

Since Sunday was celebrated as “the day of the [Christ’s] resurrection,” Christians found it “invested . . . with special character as a symbol of redemption in Christ,” inducing their shifting its celebration to Sunday.¹² This, however, does not explain how the practice became standard in the Roman Empire, where the Israelites and their seventh-day Sabbath were a comparatively minor presence. Christians, with a weekly first-day Sabbath, were initially a smaller offshoot of these relatively (to the Romans) insignificant Israelites.

Also impeding the seven-day week’s development was the absence of any similar measure of days in other cultures the Romans knew. The Egyptians provided for three ten-day divisions in their thirty-day months. The Greeks had an analogous practice, roughly corresponding to the moon’s waxing, full-moon, and waning. The Romans divided their months into three segments, but of unequal lengths, not similar to seven-day weeks.¹³

Scholars studying the seven-day week admit their explanations of its origins are speculative. That being said, Witold Rybczynski, for example, theorized that the week’s seven days may reflect ancient preoccupations with supposed powers of the numeral seven,

¹² Ward, *Space Age Sunday*, 74; Solberg, *Redeem the Time*, 11. The quotations in the paragraph’s text preceding this footnote are from these sources, *ibid*, consecutively.

¹³ Rybczynski, *Waiting for the Weekend*, 25-26, cites sources calling the religious day *shabattu*, instead of *shabuttu* (Ward’s sources, n. 3, this **Chapter**, *supra*, and accompanying text, or *sab/pattu*, used by Soggin’s sources, n. 5, this **Chapter**, *supra*).

preserved in such expressions as the Seven Pillars of Wisdom, the Seven Labors of Hercules, or the Seven Wonders of the World. The ancients also supposedly discerned seven heavenly bodies with apparent motion: Saturn, Jupiter, Mars, Mercury, Venus, Sun, and Moon. Astrologers claimed each such “planet” was supposedly influenced by the god whose name it bore.¹⁴ Assigning a different planet god-name to each of seven successive days, now comprising a “week,” purportedly ceded influence over each such day to that god as well. However, “historians have been unable to fully unravel the relationship between the planetary week and the Jewish week,” though they are “obviously connected.”¹⁵

Finally, Jewish communities in the Roman Empire, though small and disdained were, nevertheless, heavily involved in trade. This made it convenient, said some scholars, for other merchants to conform to the Jewish seven-day week with Saturday-Sabbath work-abstention, since when Jews were not doing business, it was harder for others to do any either.¹⁶

Other factors favored Sunday, not Saturday, as a weekly rest day, such as its religious observance also by sun-worshipping pagan religions like Mithraism, competing with Christianity for dominance in the Empire.¹⁷ Also, there was a Roman tradition of “market days,” every eighth or ninth day. These increasingly recurred within the now-developing

¹⁴ The sun and moon, at that time, were considered “planets.” “Tuesday” through “Friday” were renamed by Northern Europeans for Norse gods whose mythological functions paralleled their Greco-Roman pagan-deity counterparts. Ibid, 30.

¹⁵ Ibid, 34. Previous discussion in this paragraph is drawn from *ibid*, 22-33.

¹⁶ Ibid.

¹⁷ Ibid, 36-37.

seven-day week, often on Christian Sundays, which commenced with worshipers celebrating Christian Eucharist, but otherwise was “an ordinary working day.”¹⁸

Presumably due to such pressures towards a Sunday cessation from labor, the Roman Emperor Constantine, in 321 C.E., issued a Sunday observance edict, providing in part:

On the venerable day of the sun, let the magistrates and people residing in cities rest, and let all workshops be closed. In the country, however, persons engaged in the work of cultivation may freely and lawfully continue their pursuits; because it often happens that another day is not so suitable for grain-sowing or vine-planting; lest by neglecting the proper moment . . . the bounty of heaven should be lost.¹⁹

Constantine also, significantly, ordered his soldiers to pray, in part: “We acknowledge thee the only God: we own thee as our King . . . Together we pray to thee, and beseech thee long

¹⁸ Rybczynski, *Waiting for the Weekend*, 66-67. This “market day” influence may have confused whether Sunday was to be a day for rest and worship or for worship and shopping as implied, for example, in *Francisco*. See **Chapters 2 and 8** herein.

¹⁹ Solberg, *Redeem the Time*, 12, quoting the edict, at n.11, from James A. Hessey, *Sunday: Its Origin, History, and Present Obligation*, 3d ed. (London: 1866.), 58. Ward, *Space Age Sunday*, 77 and n.18, has a slightly different translation, varying little substantively. Constantine’s edict was noted in *Richardson v. Goddard*, 64 U.S. (23 How.) 28, 41 (1859) (“The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by the Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church.”). In *McGowan v. Maryland*, 360 U.S. 459 (1962) (concurring opinion), however, Justice Frankfurter declared: “Constantine’s edict proscribing labor on the venerable day of the Sun . . . [should be] passed over,” and Sunday closing law analysis confined to “modern England, the American Colonies, and the States . . .,” *Ibid*, at 470. However, the Jewish sabbath’s confusing origins (**Chapter 3(a)**, *ibid*), and confusion concerning Constantine’s Sunday edict, (**Chapter 3(b)**, herein), perhaps augured later confusion about what closing laws restricted in Virginia case law in **Chapters 6 through 8**, herein, for example. Justice Frankfurter may have unduly discounted this earlier history.

to preserve to us, safe and triumphant, our Emperor Constantine and his pious sons.”²⁰

Hiley Ward found it unclear if Constantine was a practicing Christian, but saw his quoted edict and prayer as political, no matter his religious sincerity.²¹ Since the Emperor was protected by an army of diverse faiths, with Christianity not yet dominant over pagan creeds, the prayer was prudently ambiguous, it could be argued, about what religion was being followed. It did not mention Christ nor the Fourth Commandment’s Sabbath mandate, making it congenial to either Christianity or Mithraism. In the Emperor’s above-quoted no-work-on-Sunday edict, only his urban subjects (whom he, presumably, more easily controlled), were ordered to cease work. Those in the country had broader exemptions from ceasing labor in part, arguably because, being more remote, they were less subject to the emperor’s control.²² By this explanation, the edict became a face-saving way to excuse its nonenforcement in rural areas, probably beyond his power in any event. Furthermore, the text of the Emperor’s prayer appears more devoted to his glorification, rather than any ben-

²⁰ Hiley H. Ward, *Space Age Sunday*, 77, citing and quoting, at nn. 62, 67 and 68 therein, Eusebius, “The Life of the Blessed Emperor Constantine,” quoted from Philip Schaff and Henry Ware, ed., *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church* (New York: Christian Literature Co, 1890), 1:545.

²¹ Ibid. Emperor Constantine’s devotion to and understanding of Christianity is a complex matter of study, summarized as favorable, but incremental, adjustments towards that faith. He was not baptized until on his deathbed in 337 C.E. See Marcel Le Glay, et al., *A History of Rome*, 2d ed. (Malden, Mass./Oxford: Blackwell, 2001), 411-412.

²² This arguably was so despite the edict’s elaborate justification for not ordering rural cessation of labor (to the effect that nature does not allow delay of farm tasks) which, by its very intricacy suggested, perhaps, a different underlying explanation.

efit to his soldiers, subjects, or homage to the deity to whom, ostensibly, it was addressed. Thus, Constantine's "prayer" and edict perhaps, were not to be explained solely by religious motivation; their religious attributes being to some degree a facade concealing his actual purpose of sustaining his political dominance. They could be, instead, an early but by no means unique example of allegedly religious government activity also intended to augment power of those controlling the government. As will be seen, such suggestions of self-serving motivations offer plausible explanations about how later confusions could arise about the purpose of statutorily-required Sunday rest, as occurred in the *Francisco* case.²³

Thus, paralleling the confusion about the original sabbath's meaning in the Old Testament, Christian views about what was appropriate conduct on the new Christian Sunday "sabbath" were similarly conflicted. This continued into the Middle Ages:

Although the medieval Church formulated a demanding theory of Christian Sabbatarianism, it failed to secure general compliance with its expressed ideal. Many laymen . . . took their morning sleep on the Lord's Day and spent the remainder of Sunday in various innocent or vicious pastimes. . . . Mother Church indulgently winked at these lapses as long as offenders did not question her precepts.²⁴

So at the very beginning of governmental "Sunday rest" edicts, there was a lack of consensus similar to those much later arising, as in *Francisco*, over what was permitted on Sunday, arguably derived from the initial ambiguity over what the Sabbath was observing.

²³ The initial review of *Francisco* was in **Chapter 2** herein, supra. The discussion of possible concealed motivations in *Francisco* will be in **Chapter 8** hereinafter.

²⁴ Solberg, *Redeem the Time*, 14-15.

In the fourth and fifth centuries, C.E., church councils began requiring strict Sunday rest and worship attendance. “Civil officials proscribed the payment of debts and legal proceedings, and in 386 Emperor Theodosius . . . forbade the transaction of business on Sunday.” Nevertheless, recreation was not banned, and “necessary” duties could be performed, if not interfering with worship. In the next thousand years, however, the Church declared “the new Christian ceremonies to be the legitimate successors of the old Jewish ceremonies . . . rel[ying] on the Fourth Commandment . . . [as] a moral law binding all mankind rather than a ceremonial law only binding Jews.” Increasingly “bishops and princes enjoined . . . [Sunday] labor and commercial activities and . . . travel and recreation.” After the Norman conquest, Sunday laws in England were enforced with increasing strictness.²⁵ In continuing the topic of this thesis, however, the next significant event that principally affected what would become Virginia’s Sunday closing laws was Henry VIII’s takeover of the Catholic church in England. It is to this event, its closing law consequences, and the relation of both to Virginia’s colonization, that we now turn.

²⁵ Ibid, 13-14 (all quoted passages in this paragraph are from this source).

Chapter 4: IMPACT OF THE ENGLISH REFORMATION ON SUNDAY LAWS, BOTH IN ENGLAND AND IN COLONIAL VIRGINIA.

(a) The Henrician Church Confiscation and its Closing Law Impacts.

Henry VIII broke with Rome in 1533, appropriating to himself that part of the Catholic Church in his realm; renamed the “Church of England,” which he headed.¹ He was cautious in reforming Sunday observance. His reconstituted Church initially followed Catholic doctrine that the Fourth Commandment was not “literally binding” on Christians, in contrast to what were seen as the other commandments’ moral imperatives. Therefore, Sunday labor was expressly allowed “if necessary . . . to save . . . corn or cattle; indeed, failure to do so for scruple of conscience offended God.” Henry’s Church thereby “denounced idleness . . . [yet] offered no sanction for Sunday amusements or recreations.”²

After a more radical Protestantism under Henry’s successor, his boy-king son Edward VI (1547-1553), then back toward Catholicism in the yet-briefer reign of his daughter “Bloody” Mary (1553-1558), England finally “demonstrated the Anglican spirit of compromise,” as achieved by Elizabeth I. She induced Parliament to adopt (1) the Act of Supremacy, requiring obedience to the sovereign, and (2) the Act of Uniformity which, while “allowing wide latitude of belief” promoted “uniformity of practice” by compulsory Sunday worship

¹ Euan Cameron, s.v. “Henry VIII,” 470-472, 471, *Oxford Companion to British History*, John Cannon, ed. (Oxford, Oxford Univ. Press, 1997). Of course, Henry neither proposed nor provided compensation to Rome for his confiscations.

² Solberg, *Redeem the Time*, 22-24.

under a more protestant Book of Common Prayer.³

But the supporters of Henry's church reorganization wanted more than to merely replace resented papal domination with a king doing the same.⁴ They increasingly saw religion as a direct covenant between God and individual worshipers, without intervening human agents, like a pope and curia or a monarch and court. Central to this concept was their view of a sacred obligation to honor the Sunday Sabbath. Solberg found four aspects to this increasing centrality of the English Sabbath: (1) the vernacular Bible; (2) covenant theology; (3) the so-called Protestant "work ethic;" and (4) condemnation of Sunday recreation.⁵ These shaped the life-experience and social outlook of English subjects and influenced those who emigrated to Virginia and the pattern of life they adopted there, including Sunday closing law observances.⁶

As to Solberg's first factor, the vernacular Bible, the 1560 Geneva Bible (so-called because translated there by Protestant English exiles during Catholic Queen Mary's reign)

³ Ibid, 25, 28.

⁴ The balance of this **Chapter 4(a)** draws on Solberg, *Redeem the Time*, 24-48.

⁵ Ibid, 33.

⁶ This view supported by: Perry Miller, "Religion and Society in the early Literature of Virginia," in *Errand in the Wilderness* (Cambridge, Mass.: Harvard Univ. Press, 1956), 101 (In Virginia, religion was "the really energizing propulsion" for settlement.); Thomas N. Page, *The Old Dominion: Her Making and Her Manners* (New York: Charles Scribners & Sons, 1914), 364 ("planting of Virginia had its origin in the religious zeal of the people of England."); Solberg, *Redeem the Time*, 86, though asserting these sources "overstate," nevertheless allowed that "there can be little doubt that a desire to advance the kingdom of God as well as to accumulate earthly riches," underlaid Virginia's colonization.

generated tremendous interest in the scriptures, now accessible in idiomatic English. Earnest men came to “measure the truth of religion by the square of the Word,” wrote John Stockman in 1578.⁷ Increasingly they came to view all scripture as divinely inspired, to be followed and applied in full.

The Thirty-Nine Articles, originally promulgated to resolve then-major issues of faith, somewhat straddled the question of obedience to the Fourth Commandment.⁸ However, increasingly influential doctrinaire Puritans insisted that all Ten Commandments be part of English jurisprudence. They saw the Fourth Commandment as requiring Sunday sabbath observance, despite what Solberg termed “momentous theological confusion” in equating this

⁷ Solberg, 33, n. 19, quoting Stockman from Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (Cambridge: Harvard Univ. Press, 1965), 187.

⁸ Article VII of the Thirty-Nine Articles provided: “The Old Testament is not contrary to the New, . . . Although the Law given from God by Moses, as touching Ceremonies and Rites, do not bind Christian men, nor the civil precepts thereof of necessity to be received . . . : yet . . . no Christian . . . is free from . . . the Commandments which are called Moral.” Solberg, *ibid*, quoting E. Tyrell Green, *The Thirty-Nine Articles and the Age of Reformation* (London, 1896), 53. The Articles were promulgated by Anglican bishops in Convocation in 1563, Rosemary O’Day, *Longman Companion to the Tudor Age* (New York: Longman, 1995), 60, incorporated into English law in 1628. Will and Ariel Durant, *The Story of Civilization, The Age of Reason Begins* (New York: Simon & Schuster, 1961), 7:187. The Thirty-Nine Articles’ difficulty in distinguishing between mandatory “moral” imperatives of the commandments, contrasted with those “touching Ceremonies and Rites,” presumably including Fourth Commandment-imposed non-imperative Saturday Sabbath, likely confused what civil law permitted (or not) on Sunday. This particularly applied to Sunday closing laws, converting theological admonitions into legal requirements, and thus contributing, it would seem, to legal uncertainties revealed on appeal by cases such as *Francisco* (see **Chapters 2 and 8** herein).

with the Jewish sabbath.⁹

Solberg's second factor, covenant theology, was fundamental to Puritanism. Depending on the variant professed, Puritans asserted humankind had bound itself either (1) in exchange for God's promise of salvation, to follow the Ten Commandments (the covenant of "works"); or (2) to recommitted faith in God, in return for God's promise to redeem the fallen through a Savior (the covenant of "grace"). By either view, religious preparation was needed. This preparation became the Sunday sabbath's central task, making it "born twins" with Puritan theology.¹⁰

Solberg's third sabbath-intensifying factor, the economic impact of the "protestant ethic," he derived from Max Weber's classic, though controverted, *Protestant Ethic and the Spirit of Capitalism*.¹¹ In Weber's view, Solberg explained, "the Calvinist conception of the calling spurred the individual, anxious about the certainty of salvation, to prove his faith by strenuous activity in his worldly vocation." While Calvin did not believe salvation required good works, "Weber argued the Calvinists regarded them as indispensable signs of election."¹² As Weber saw it, "the work ethic became a vital part of the Puritan code of

⁹ Solberg, *ibid*, 35.

¹⁰ *Ibid*, 35-40.

¹¹ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York: Scribner's, 1958) (hereinafter: "*PE*").

¹² Solberg, *Redeem the Time*, 40 (emphasis added). *PE* conceded the industrial revolution occurred over a century after events here-described, but claimed the process initiating that revolution originated in earlier-developing Puritanism. Solberg, 42.

conduct . . . , evidenc[ing] a proper understanding of how to realize God's true order. . . . Time was fleeting and precious, a supreme value, which God held men strictly accountable to use wisely."¹³ One Puritan divine admonished the faithful to "Redeeme the Time," a variant of an admonition by St. Paul.¹⁴ Solberg explained the connection of the "protestant ethic" to Sabbatarianism¹⁵ as one which

facilitated the emergence of modern society by rationalizing time and the productive process. . . . on a . . . uniform schedule. . . . The concentration of religious observance on one day a week admirably suited. . . new forms of economic organization. Sabbatarianism held workers to their tasks six days a week and . . . rest on the seventh. Then, strength restored, they could start the cycle over again. Thus, the theological convictions of English Calvinists and the environment of an incipient capitalistic industrial society reinforced each other.¹⁶

¹³ Ibid, 44.

¹⁴ Ibid. Solberg here quotes St. Paul, admonishing the faithful to be "Redeeming the time, because the days are evil." Eph. 5:16, King James version, of which Solberg's book-title (*Redeem the Time*) is a variant.

¹⁵ "Sabbatarianism" here means "strict observance of the Sabbath," s.v. "Sabbatarian," *American Heritage Dictionary* (4th ed.). An alternative meaning is observing "Saturday as the Sabbath, as in Judaism." Ibid.

¹⁶ Solberg, *Redeem the Time*, 46 (footnote omitted). Some further observations:

(1) Solberg noted, *ibid*, 41, nn. 47 and 48, "voluminous" literature debating (in 1977) Weber's thesis. It has increased since then. Alan Sica, "Rationalization and Culture," in Stephen Turner, ed, *A Cambridge Companion to Weber* (Cambridge: Cambridge U. Press for German Historical Inst., 2000) ("*Companion*"), 49, n. 12, noted, for example, a proposed bibliography of 3,000 secondary works in English on Weber, many about *PE*.

(2) Typical of Weberian texts is *Weber's Protestant Ethic: Origins, Evidence, Contexts* ("*Evidence*"), Hartmut Lehman and Kenneth F. Ledford, eds. (Cambridge: Cambridge Univ. Press, 1993), with *PE* views from avid support to outright rejection.

(continued...)

Weber saw Benjamin Franklin as a quintessential personification of the Protestant Ethic, many of whose writings he translated into German to illustrate his *PE* thesis. Franklin, *PE* notes, recalled his father teaching him, from the Book of Proverbs, "Seest thou a man dili-

¹⁶(...continued)

(a) A *PE* critic, Malcolm H. McKinnon, asserted in "The Longevity of the Thesis: A Critique of the Critics," *Evidence*, 212-213: "[T]here is no crisis . . . in dogmatic Calvinism [requiring] . . . good works . . . [;] no call for devotion to a workaday pastime . . . Calvinism . . . did not contribute to capitalism in the way that Weber claims."

(b) David Zaret, however, objected to MacKinnon, as expressed in (2) (a), *ibid*, arguing he "ignores most of the relevant . . . evidence . . . and attributes implausible tidbits" as applicable Puritan thought, by omitting *PE* passages "that strongly modify or contradict," those he attacked, "The Use and Abuse of Textual Data," *Evidence*, 245, 247.

(c) An uneasy compromise was offered by *Evidence* co-editor Lehmann, conceding *PE*'s "dated" thesis, but stressing "no one since" Weber "has had an [equal] influence on research" "Preface," *Evidence*, viii. As Guenther Roth more perversely stated, "the Weber thesis . . . has refused to die in spite of . . . exasperated efforts to be done with it. . . . [For] quite a few scholars it has become counterproductive; its very longevity appears a nuisance." "Introduction," *Evidence*, 4.

(d) One might counter Roth in (c), *ibid*, that if a "thesis" has "refused to die," no matter how "exasperated" some are to "be done with it," maybe that meant there was something to it. As expressed more cautiously by Alastair Hamilton: "[I]t is just as difficult to demolish Weber's thesis as it is to substantiate it," "Max Weber's *Protestant Ethic and the Spirit of Capitalism*," *Companion*, 169; conceding, however, "there is in fact not much in . . . Weber's thesis that stands up to modern examination." *Ibid*, at 171.

(3) Such scholarly conflicts might be harmonized by inferring that Weber's informed speculations about Protestantism's relation to Europe's adoption of market capitalism many scholars deem models of insight which needed, however, augmentation by current research those such as Solberg, for example, seemed interested to undertake, to rectify Weber's apparent disinterest in such tasks.

gent in his business? he shall stand before kings. . . .”¹⁷ This expressed, to Franklin (and Weber), the mores of nascent capitalism united with the obligations of Judeo-Christian faith.

Solberg’s fourth factor, the condemnation of Sunday recreation, recognized that those “inclined to Puritanism were fundamentally hostile to sportive play” as “essentially frivolous.” Such diversions obviously interfered with Sabbath observance, “since it was the only non-work day,” when most persons could participate in them. Pursuit of pleasure, the Puritans believed, constituted both mortal danger to the believer’s soul, and also, an invitation to violate the religious observances mandated for the Sabbath.¹⁸

Thus, in summary:

Sabbatarianism was to prove highly influential in Anglo-American history. . . . The conviction was gaining ground . . . that well-kept Sabbaths were essential to the realization of the New Jerusalem. . . . emphasiz[ing] a way of life in which duty to God outweighed the claims of Mammon . . . It refused to allow . . . the desire for material prosperity to deny man his dignity and humanity. Sabbatarianism made for the highest moral standards, and nowhere would its beneficial effect on individual character and community life be more felt than in British America.¹⁹

(b) Sabbath Sanctification by Law in Colonial Virginia.

The Puritan impetus for greater Sunday-Sabbath sanctity was occurring in England at the same time Virginia’s colonization significantly got under way. Virginia and the other British colonies became, in varying degrees, laboratories for implementing Puritan social

¹⁷ Proverbs 22:29 (KJV); Weber, *PE*, 53 (noting Franklin’s interest in passage).

¹⁸ Solberg, *Redeem the Time*, 48-51.

¹⁹ *Ibid*, 48.

behavior, including Sabbath observance.

The perceived need to control Virginia's social behavior was significantly influenced by its floundering development from about 1607 to 1610. Its organizers saw this as partly due to "the profane and unruly persons recruited for the undertaking" and the failure of church and state to "cooperate[] to restrain wickedness and promote righteousness," but that "temporal affairs would prosper if the authorities established religion on a firmer basis."

Because of these problems, in 1610 the colony was reorganized. Its lieutenant general, Sir Thomas Gates, promulgated severe *Lawes Divine, Morall and Martial*, with mandatory Sunday worship and catechism. Guards locked settlement gates and searched dwellings after services began, to enforce attendance. Penalties for violations included fines, whipping and death.²⁰ While "there is no record of any person suffering the death penalty"²¹ for not attending services, Gates forcefully implemented in Virginia Puritan England's Sabbatarian views. These Virginia colonial "laws" were more like a military commander's field orders. Gates treated colonists like rank and file soldiers, enforcing church attendance to improve their behavior, to end the indiscipline impairing colonial development.

The harsh "*Lawes*" Gates imposed, while improving colonial discipline, also discour-

²⁰ Gate's *Lawes*, published by William Strachey, colony historian and first secretary, titled *For the Colony in Virginia Brittania: Lawes Divine, Morall and Martiall* (London: 1612). The death penalty and whippings were rescinded in 1618 and imprisonments, up to a year-and-a-day, substituted. Solberg, *Redeem the Time*, 86-87 & n. 6; 89, from which quotations in this footnoted paragraph and the paragraph preceding it were taken.

²¹ Leo Pfeffer, "Sunday Closing Laws," *Encyclopedia of the American Constitution*, Leonard W. Levy & Kenneth Karst, ed., 4 vols. (New York: Macmillan, 1986), 4:1809.

aged immigration. The Virginia Company, the colony's proprietor, sought to remedy this by, first, offering generous land grants to those who remained for a given period. Second, it established nominal self-government, a colonial "General Assembly" of "two burgesses out of every town, hundred or . . . plantation, . . . to be respectively chosen by the inhabitants . . . to make . . . such general laws and orders . . . for . . . good government, as shall . . . appear necessary or requisite. . . ." ²²

This supposedly democratic "House of Burgesses," respected historians assert, was, nevertheless, controlled by colonists of wealth and position. Additional restraints were imposed by the appointed colonial governor and his subordinates.²³ Nevertheless this Assembly "set the pattern for government which within two centuries led to genuine democracy." Whatever its democratic shortcomings; its provisions requiring election and adoption

²² "An Ordinance and Constitution of the Virginia Company in England for a Council of State and General Assembly," ¶ 4, July 24, 1621; Clarence L. Ver Steeg & Richard Hofstadter, ed., *Great Issues in American History: From Settlement to Revolution*, vol. I (New York: Vintage Books/Random House, 1969), 69, 72. The editors state: (a) The Burgesses first met pursuant to the predecessor of this "Ordinance and Constitution," from July 30 to August 4, 1619; and (b) Although "the instructions from . . . England authorizing the [1619] meeting are missing, . . . historians believe the instructions reissued in 1621 [i.e., those quoted in the text preceding this n. 22] were based upon the original instructions sent in 1619." *Ibid*, 70.

²³ "[M]en at the top in Virginia, whether councillors, burgesses, or county commissioners, . . . [without] other modes of social control, . . . had to keep before the rest of the population an exalted view of their position." Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975, paperback ed., 1995), 247-248. Thus, Morgan observed, while the Virginia Company "in 1618 had inaugurated a popularly elected representative assembly, . . . effective power remained in the governor and his council," *ibid*, 123 (footnote omitted).

of legislation by majority vote were almost revolutionary for its time.

Thus, the House of Burgesses, despite controls exercised by those of higher social status, probably reflected popular sentiment to a degree unusual for its era. It is significant, therefore, that among measures adopted at its first meeting in 1619 was that "all settlers were to attend church on Sunday bringing their weapons with them."²⁴ This underlined the importance Virginia's earliest electorate placed on enforcing Sunday religious observance.

Colonial Virginia's further statutory regulation of Sunday can be followed in a recompilation of all Virginia colonial, and immediately post-colonial, legislation, authorized in the early nineteenth century by the Virginia General Assembly and meticulously edited by William Hening (hereinafter: "Hening").²⁵ The seventeenth century Virginia sentiment for a sacrosanct Sunday is illustrated in this text by a 1629 reenactment of 1623 legislation:

IT is ordered that there bee an especiall care taken . . . that the people doe repaire to their churches on the Saboth day, and to see that the penalty of one pound of tobacco for every time of absence and 50 pound for every months absence sett downe in the act of the Generall Assembly 1623, be levyed and the delinquents to pay the same, as alsoe to see that the Saboth day be not be not ordinarily profaned by working in any employments or by

²⁴ Richard Middleton, *Colonial America: A History, 1585-1776*, 2d ed. (Malden, Mass: Blackwell, 1997), 61, is the source of the quotations in the paragraph of text here footnoted and also in the paragraph immediately preceding it.

²⁵ William Waller Hening, ed., *The Statutes at Large; being a Collection of the Laws of Virginia, from the First Session of the Legislature in the Year 1619, Published Pursuant to an Act of the General Assembly of Virginia* (13 vols., various publishers, 1819 - 1823; Facsimile Reprint, Jamestown Foundation of the Commonwealth of Virginia by Univ. Press of Virginia, Charlottesville, 1969) (Hereinafter "Hening," followed by (roman numeral) numbered volume and (arabic-numbered) page of the *Statutes at Large*). Differing publication data is footnoted for each volume when it is first referenced or quoted.

journeying from place to place.²⁶

This statute's asserting that the "Saboth" was not to be "ordinarily" profaned by work suggested, by negative inference, that work could be "[extra-]ordinarily" performed on the Sabbath without "profan[ing]" it. Such "extraordinary" circumstances were, presumably, known to those gentlemen called upon to construe the statute. This, also presumably, rendered it, in their minds, unnecessary, to spell out what they were.²⁷ This ambiguity was exacerbated by a tendency of the legislators to incorporate by reference other law or practice, usually of England, trusting to later interpretation for what was actually meant.²⁸

²⁶ Hening, I:144, Act VII (New York: R. & W. & G. Bartow, 1823); from General Assembly session commencing October 16, 1629. (Hening, in an asterisked footnote, *ibid.*, advised that 1629 typographical conventions required "i" be substituted for "j" for "iourneying" [journeying] in this quotation.) In 1625, the Virginia Company lost its charter. Virginia became a royal colony and the House of Burgesses lost its legislative authority. In 1639 Charles I granted the colonists power "with the governour and council" to enact legislation "as near as may be to the laws of England." Middleton, *Colonial America*, 67.

²⁷ Similar thoughts were expressed in a text closer to the colonial era than the present day, Theodore Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law* (New York: John S. Voorhies, 1857) ("*Constitutional Interpretation*"), 242-43:

It may . . . be . . . when laws were few . . . [and] legislation was confined to a small and select class, to which . . . the judiciary belonged, . . . [it] might . . . really possess, a considerable personal knowledge of legislative intent, . . . [¶] But . . . in this country where the judiciary is so completely separated from the legislature, it must be untrue in fact that they [the judiciary] can have any personal knowledge . . . to instruct them as to the legislative intention; . . . any general theory . . . of this kind must be dangerous in practice."

²⁸ Some examples are (with emphasis added):

(continued...)

Roman Emperor Constantine's 321 C.E edict, earlier discussed,²⁹ excused agricul-

²⁸(...continued)

(1) The Grand Assembly of March 13, 1657, enacted Act IV, "THE lawes of England against biggamy or haveing more than one wife or husband shall be putt in execution in this countrie." Hening, I:434. Here a complex body of law is casually incorporated by reference into Virginia law, without explaining what it was. A seemingly "understood" way of legislating, as this illustrates, was announcing a general principle (i.e., "the lawes of England against biggamy . . . shall be putt in execution"), leaving details for later fill-in. Extensive initial definition was deemed unnecessary and was thereby avoided.

(2) Enacted the same session as (1), *ibid*, was Hening, I:435, Act VIII: "And commanders of shippes respectively to take care that poor servants do not want cloathes and bedding in the voyage [to Virginia], in which . . . if any shall offend they shall be liable to grievous censure here according to the meritt of the offence." The statute did not define "grievous censure" or the "meritt of the offence." English gentlemen, the drafters arguably supposed, could determine such things if an actual controversy arose. Thus, it "incorporates by reference," general practices of English gentry, not any specific body of law.

(3) As applied to Sunday closing legislation, the March 23, 1660, "Grand Assemblie," Act IX, Hening, II:48 (New York: R. & W. G. Bartow, 1823)(1660-1682), provided that on Sunday "noe other thing be used or done, that may tend to the prophana-tion of that day," Hening, II:48, Act IX, in part (emphasis added). Thus not only what would "prophane" the day, but also what "may tend" to do so was proscribed. As in (2), *ibid.*, an incorporation by reference of the community's general understanding was inserted as its statutory standard, extended to prosecuting those who "by common fame" [i.e., rumor], have been "sabbath abuseing." Hening II:51-52.

(4) This referencing, within a statute, to other, vaguely-described legal subjects, continued in Virginia's revolutionary government. Article VII of Virginia's June 29, 1776 Constitution provided: "That the right of suffrage in the election of both Houses shall remain as exercised at present . . ." Hening, I:52. Important voting rights thus were not spelled out. Instead, reference was made to then-current (1776) practice ("exercised at present"), without specifying what it was. This no-doubt worked well when those who drafted and interpreted such statutes were small in number and well-known to each other. However, this covered over, and later exacerbated, friction concerning, for example, what was, or was not, a "necessity" under the Sunday closing laws. As time passed, growing numbers of statutory enactors, on one hand, and judicial enforcers, on the other, knew progressively less about each other and of any common principles under which they operated, as Sedgwick explained, n. 27, *supra*, this **Chapter**. This multiplied opportunities for misunderstanding.

tural estate-owners from their workers ceasing Sunday labor, otherwise required by the remainder of that edict, when abstention could cost “the bounty of heaven.” This illustrated a recurrent and virtually unyielding tension, repeated in the Virginia colonial statute quoted in the previous paragraph, between the perceived mandates of heaven and the actual realities on earth: For society’s good, some Sunday work, though ostensibly prohibited by God, could not, in practice, be deferred. This vexed drafters and would-be enforcers of Sunday closing laws as long as such statutes were in force. “Necessity” was ultimately adopted in closing law statutes as a shorthand description of circumstances under which otherwise proscribed Sunday-labor was allowed. For example, legislation of the Burgesses “Grand Assemblie” of March 2, 1642, provided:

Be it also enacted & confirmed, for the better observation of the Sabbath that no persons shall take a voyage uppon the same, except it be to church or for other causes of extreme necessitie upon the penaltie of the forfeiture for such offence of twenty pounds of tobacco being justly convicted for the same.³⁰

There was a similar enactment in 1657.³¹ Absent, however, were explanations of what con-

²⁹ See the quoted text from the edict herein, preceding n. 19, **Chapter 3**, *supra*.

³⁰ Hening, I:261, Act XXXV, apparently the first use in Virginia Sunday legislation of the term “necessity.” See n. 32, this **Chapter**, *infra*, concerning the fine.

³¹ Burgesses also used “Necessity” in their March 13, 1657, “Grand Assembly,” providing: “THAT the Lord’s day be kept holy, and that no journeys be made except in cases of emergent necessitie” Hening, I:434, Act III.

stituted the “necessitie” converting illegal Sunday labor into unpunishable lawful conduct.³² An analytically comparable problem, centuries later, confronted United States Supreme Court Justice Potter Stewart, when attempting to distinguish proscribed “pornography” from constitutionally protected artistic expression. Conceding that “perhaps” he could “never succeed in intelligently” defining pornography, he triumphantly concluded, “But I know it when I see it”³³ Similarly, in the many Sunday closing law cases arising in Virginia and other states, as will be seen, “necessity” became undefinable by any standards except those so elastic as to almost defy analysis.³⁴ To explain how otherwise prohibited Sunday labor could become lawful work, excepted from prosecution as a statutory “necessity,” judges writing those opinions, in effect declared, in so many words, like Justice Stewart, that they “knew it when they saw it.” Also like him, however, they had difficulty in articulating how

³² Solberg termed the twenty-pounds-of-tobacco penalty “staggering,” exceeding £7, sterling, in 1619 English currency, *Redeem the Time*, 90. Will Durant valued one seventeenth-century English pound-sterling at fifty 1960 U.S. dollars. *The Story of Civilization: The Age of Reason Begins*, 7:ix (Preface), n. 19, **Chapter 3**, *supra*. Thus, a month’s unlawful absence from Sunday worship could have incurred fines equivalent to two-hundred 1960 U.S. dollars. The Consumer Price Index showed a well-over four-fold cost-of-living increase since 1960, boosting the fine to a year 2000 equivalent of almost \$1,000. See, *1999 World Almanac and Book of Facts* (Mahwah, N.J.: World Almanac Books, 1999), 111 (U.S. Consumer price Indexes).

³³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³⁴ “[T]he meaning of necessity had traveled a tortuous route” to become “nearly meaningless.” Alexis McCrossen, *Holy Day, Holiday: The American Sunday* (Ithaca, N.Y.: Cornell Univ. Press, 2000), 109, citing the wide latitude given, 108-110, nn. 29-35.

they reached such conclusions.³⁵

In 1661, the Burgesses enacted that “the canons sett downe in the liturgie of the church of England” were to be followed. Ministers could not “teach any other catechisme than . . . in the booke of common prayer.” Church attendance was mandated and the maximum fine for absence increased to fifty pounds of tobacco. Prosecutions were upon presentment by the church wardens and fines were contributed to parish levies.³⁶

The Burgesses were aware, as a preamble to their 1691 enactment concerning church attendance stated, of continuing Sabbath violations, allegedly due to lack of clarity in punishment.³⁷ Their remedy was to legislate that absence from church incurred a forfeiture of

³⁵ See nn. 55-60 and 63, **Chapter 7**, *infra*, and supporting text.

³⁶ Hening, II:47, Acts VI & VII; *ibid*, II:48, Act IX. Although the text shows only the commencement, on March 23, 1660, of the legislative session adopting this statute; editor Hening, in an asterisked footnote, *ibid* 33, concluded, from analysis of other contemporary documents, that its enactment was in 1661, about a year after the session commenced. See also, n 32, this **Chapter**, *supra*, concerning the substantiality of a fine of fifty pounds of tobacco.

³⁷ Hening, III:71, 72 (Philadelphia: Thomas Desilver, 1823): Laws against “sabbath abuseing” and other wrongs, “have not produced the desired effect” partly due to “not directing what method shall be followed to [punish offenders] . . . , and for want of sufficient penalties....”

Requiring the “holy keeping of the Lord’s day” was enacted in a Burgesses session commencing April 16, 1691, providing, Hening, III, 72-73:

[F]orasmuch as nothing is more acceptable to God than the true and sincere . . . worship of him according to his holy will, and that the holy keeping of the Lords day is a principall part of the true service of God, which in very many places of this dominion hath been . . . prophained and neglected, . . . *Bee it*

(continued...)

twenty shillings.³⁸ The statute's rigors were somewhat relaxed by a 1744 amendment excusing non-attendance on proof of approved worship at another parish,³⁹ marking the last Sabbath-law change of substance before the Revolution.

Prerevolutionary Virginia's legislative enactments enforcing Sunday worship observance, reviewed in this **Chapter 4(b)**, emphasized the view of those in society who saw themselves enforcing God's dictates. They saw those dictates achieved, in part, by compelling the entire population to cease Sunday secular labor and, instead, actively worship,

³⁷(...continued)

enacted, . . . That there shall be no meetings, assemblies, or concourse of people out of their parishes on the Lords day, and that no person . . . shall travell upon the said day, and that no other thing or matter whatsoever be done on that day which tends to the prophanation of the same, but that the same be kept holy in all respects upon pain that every person . . . so offending . . . shall . . . forfeit twenty shillings. [Hening, III:72-73.]

³⁸ Ibid, III:73. A similar statute, prohibiting being "wilfully absent" from "divine service at his . . . parish church" for a month except permitted dissenters and "cases of necessity and charity" was enacted at the Assembly session commencing March 19, 1702. Ibid, III: 358, 360-361:

That if any person, being of . . . twenty-one years, . . . shall wilfully absent him or herself from divine service at his or her parish church, the space of one month . . . and shall not, when there, in a decent and orderly manner, continue till the . . . service is ended; and if any person shall, on that day . . . make any journey, and travel upon the road, except to and from church, (cases of necessity and charity excepted,) or shall, . . . be found working in their corn or tobacco, or any other labour of their ordinary calling, other than is necessary for the sustenance of man and beast; every person . . . being . . . convicted . . . shall forfeit and pay, for every such offense, . . . five shillings, or fifty pounds of tobacco

³⁹ Ibid, V:220, 226, Chap. II, ¶ IV (Richmond: Franklin Press, 1819) (1738-1748).

consistent with Christian doctrine promulgated by the Established Church. Solberg pointed out, however, that this legislative portrait of enforced Sabbath observance did not fully reflect what was actually happening in Virginia. Instead, he asserted, "economic development undermined the physical basis upon which proper sanctification of the Sabbath rested." Virginia's then-main source of revenue, tobacco, destroyed the soil, compelling search for new lands. The energy the colony's larger landowners necessarily devoted to this task "made it difficult to attend church and supervise morality." That this was, indeed, happening, Solberg illustrated, in part, through minutes of a "mid-[seventeenth] century . . . grand jury of Lower Norfolk County, complaining of general indifference of Sunday observance, [and] charg[ing] the entire population . . . with breach of the day."⁴⁰

Thus, as the American Revolution approached, Virginia society was advocating, through adoption and enforcement of its closing laws, an intensely Sunday worship-centered life. Simultaneously, however, a significant portion of its leadership was expanding its search for land, and profit-making through its use. This made it difficult, perhaps effectively impossible, for them to actually practice the sanctified Sabbath that colonial legislation sought to preserve. A paradox resulted: The Sabbath observance called for by puritan theology, underpinning the colony's creation, ostensibly enforced by colonial legislation, conflicted with the earthly realities of colonial Virginian life. Economic existence made it increasingly difficult to cease laboring on the legislatively sanctified Sunday Sabbath. As will

⁴⁰

Solberg, *Redeem the Time*, 92 (footnote omitted).

be seen hereinafter in this thesis, the complexities of this paradox were exacerbated after the Revolution, when it became harder still for this commercial society to both achieve the financial success such commerce sought, while at the same time obeying the requirements of Sabbatarian legislation to cease labor one day of the week.

Chapter 5: THE REVOLUTION AND VIRGINIA'S SUNDAY CLOSING LAWS

(a) The Voiding of Colonial Sunday Closing Laws Immediately After the Commencement of the American Revolution.

What follows is not focused on the American Revolution itself, but rather its impact on Virginia's Sunday closing laws. First, however, before newly-independent Virginia would formulate its own closing laws, or any other legislation, its governmental connection with England had to be severed. America's July 4, 1776, Declaration of Independence accomplished this by declaring "these United Colonies" to be "free and independent states" that were "absolved from all allegiance to the British Crown," with "all political connection between them and the state of Great Britain . . . totally dissolved"¹

Virginia had similarly resolved earlier when "representatives of the several counties and corporations" met at Williamsburg on June 29, 1776. They unanimously adopted Virginia's Constitution asserting that "the government of this country [Virginia], as formerly exercised under the crown of *Great Britain*, is TOTALLY DISSOLVED."² Virginia's revolutionary legislators also sought to void parliamentary religious strictures by providing:

[O]ppressive acts of parliament respecting religion have been . . . enacted, and doubts have arisen . . . whether the same are in force within this commonwealth or not: For prevention whereof, *Be it enacted* . . . , That . . . every act of parliament, . . . , which renders criminal the maintaining any opinions in matters of religion, forbearing to repair to church, or the exer-

¹ Declaration of Independence. The sufficiency of this unilateral assertion of the Declaration ultimately depended, obviously, not on its legal phraseology, but on the military ability of the new government uttering it to maintain the independence it asserted.

² "Virginia's Constitution," Article I (in part), Hening, IX:112, 113 (emphasis and capitalization in original).

cising any mode of worship whatsoever, or . . . punishments for the same, shall henceforth be of no validity or force³

This voiding of “acts of parliament” punishing “forbearing to repair to church,” by the act’s text, applied only to British parliamentary statutes, not those of Virginia’s House of Burgesses. Left unexamined by this statute, therefore, was the validity of colonial pre-Revolutionary versions of such “Sunday closing” or “blue law”⁴ legislation.

The General Assembly enacted the just-quoted statute voiding British parliamentary acts concerning religion, soon after its June 29, 1776, adoption of the previously-quoted Virginia constitutional provision dissolving Virginia’s governance as “formerly exercised” by Britain.⁵ This statute was enacted, its preamble stated, due to explicit “doubts” about whether British parliamentary religious legislation had been effectively voided. This was despite the earlier-quoted state constitution provision terminating all British governmental authority. By parity of reasoning, therefore, similar legislative “doubts” presumably existed

³ Adopted October 7, 1776, Hening, IX: 164 (emphasis in original).

⁴ A “blue law” regulates or prohibits “commercial activity on Sundays,” s. v. “blue law” Black’s Law Dictionary (7th ed.). Its etymology was traced by Marc A. Stadtmauer, “Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause,” *Cardozo Arts & Entertainment L. J.*, 12(1994):213, 213, n. 2: “There are at least two theories,” for its origin. The “most prominent” was that it “. . . ‘originated in 1781, when the Sunday laws of New Haven, Connecticut were printed on blue paper.’ The second [claimed] . . . ‘blue’ is a synonym for ‘puritanical’ or ‘strict’ [citations omitted].” Andrew J. King, “Sunday Law in the Nineteenth Century,” *Albany L. Rev.* 64(2000):675, 676 n. 1, cites other authority favoring the “blue paper” explanation.

⁵ See quotation in text preceding n. 2, this **Chapter**, *supra*.

about whether Virginia's colonial legislation also remained in force.⁶

⁶ Early American scholarly interpretations of “contemporary construction” of constitutions and statutes (“contemporary,” that is, to the constitutions or statutes being interpreted), advancing rules (and limitations on those rules) congruent with this view, are:

(1) Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols., (Boston: Hilliard, Gray & Co., 1833) (“*Commentaries*”), 1:390: “Contemporary construction [can] . . . explain a doubtful phrase, . . . It can never abrogate the text; . . . fritter away its obvious sense; [nor] . . . enlarge its true boundaries . . .” Story was a Supreme Court Justice whose *Commentaries* guided Alexis de Tocqueville in explaining American law. Gerald T. Dunne, “Joseph Story,” *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions*, Leon Friedman & Fred L. Israel, ed. (New York: Chelsea House/RR Bowker Co., 1969), 1:443.

(2) Sedgwick, *Constitutional Interpretation* (1857), 251-52 (see, n. 27, **Chapter 4**, this thesis, *supra*): “In . . . constru[ing] a . . . doubtful statute, considerable weight is attached to the opinions . . . [of] persons learned in the law, at the time of its passage. ‘Great regard,’ says Lord Coke, ‘ought . . . to be paid to the construction which the sages of the law who lived about the time . . . it was made . . . , because they were best able to judge of the intention of the makers’ A contemporaneous is generally the best construction of a statute. It gives the sense . . . of the terms made use of by a legislature. If there is ambiguity . . . , the understanding . . . when the statute first comes into operation, sanctioned by long acquiescence [by] . . . legislature and judicial tribunals, is the strongest evidence that it has been explained in practice. . . .” Sir Edward Coke (1552-1634), whom Sedgwick quoted, *ibid*, had been Chief Justice of the Court of Common Pleas. His *Institutes* was a much-cited legal treatise, even after the American Revolution, on both sides of the Atlantic. J. A. Sharpe, s.v., “Sir Edward Coke,” *Oxford Companion to British History*, 226, at n. 1, **Chapter 4**, this thesis, *supra*. Thus, the legal doctrine here discussed was long-accepted before the Revolution, and in full flower when the Virginia statutes discussed herein were adopted.

(3) Thomas M. Cooley, *Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*, 5th ed. (Boston: Little, Brown, 1883) (“*Constitutional Limitations*”), 81-82 (emphasis added): “Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts . . . putting the instrument in operation In the first case it can have very little force, because the . . . public understanding, when nothing has been done . . . , must . . . be vague But where there has been a practical construction, . . . acquiesced in for a considerable period, considerations in favor of . . . this construction sometimes present themselves to the courts with a . . . force . . . not easy to resist In
(continued...)

It is *not* here-asserted that the General Assembly's above-quoted 1776 "doubts"⁷ about whether British parliamentary acts on religion were void in Virginia, somehow, by being so-stated, restored the legality of those British statutes that the Virginia Constitution expressly invalidated. Lack of "long acquiescence" to those "doubts," as mandated by the three commentators just-quoted,⁸ precluded such a conclusion. However, the presence of such "doubts" suggested Jefferson's statute on religious freedom could have been enacted, in part, to (1) Remove any "doubts" about the invalidity of such English legislation and (2) Prevent any inference of "long acquiescence" to such "doubts" from arising due to purported Assembly inaction. It is also plausible that early General Assembly statutes concerning

⁶(...continued)

Martin v. Hunter's Lessee [14 U.S.] 1 Wheat. 304, 351 [(1816)], *Justice Story*, . . . say[s]: ' . . . It is an historical fact, that . . . when the Judiciary Act was submitted . . . [to] the First Congress, composed, . . . of men of great learning and ability . . . who had acted a principal part in framing, supporting, or opposing that Constitution This weight of contemporaneous exposition . . . , this acquiescence by enlightened State courts, and . . . decisions of the Supreme Court through so long a period, . . . place the doctrine upon a foundation of authority which cannot be shaken. . . .' The same doctrine was subsequently supported by Chief Justice *Marshall* . . . say[ing] that 'great weight has always been attached, . . . to contemporaneous exposition. *Cohens v. Virginia*, [19 U.S.] 6 Wheat. 264, 418 [(1821)].' The "Justice Story" quoted here, also wrote the *Commentaries* quoted in this n. 6, part (1), *supra*.

(4) The application in this thesis of "contemporary construction" to construe legislation is to assert that Declaration of Independence provisions voiding British parliamentary legislation, gave rise to Virginia constitutional provisions, declarations and statutes voiding, in the same ("contemporary construction") manner, colonial legislation that originated in the pre-revolutionary Virginia House of Burgesses.

⁷ In its statute quoted immediately preceding n. 3, this **Chapter**, *supra*.

⁸ See, for example, n. 6(2), this **Chapter**, *supra*.

religion, such as Jefferson's religious-freedom statute, were adopted, among other reasons, to also end any later argument asserting the validity of pre-Revolutionary Virginia *colonial* laws on religious subjects.

(b) Post-Revolutionary Enactment of a Virginia Closing Law.

Consistent with the principles of the just-quoted statute voiding parliamentary religious legislation, the Virginia General Assembly, at the Revolution's commencement, unanimously adopted, on June 12, 1776, its own "Declaration of Rights," providing:

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.⁹

Thus, this Article 16, contrary to Virginia colonial Sabbath laws earlier described,¹⁰ declared a universal entitlement to "free exercise of religion, according to the dictates of conscience." Under its principles, "conscience," not "force or violence," instructed the citizen in religion, suggesting a government barred from mandating church attendance.¹¹

⁹ Hening, IX:112, 113-114.

¹⁰ For example, see nn. 37-39, **Chapter 4**, and accompanying text, *supra*.

¹¹ Asserting, however, that Jefferson's Bill Establishing Religious Freedom, ambiguously, did not "explicitly prohibit establishment" of religion, was Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: Univ. of Chicago Press, 1965), 44; in Daniel L. Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia," *Religion and Political Culture in Jefferson's Virginia* (Lanham, Md.: Rowman & Littlefield, 2000), 189, 195.

Similar to earlier-described incongruities in the history of sabbath legislation,¹² however, new logical paradoxes arose concerning Virginia's post-revolutionary Sunday closing laws and related enactments. The first was that Virginia's Declaration of Rights, while negating "force or violence" to promote religious observance, still asserted a "mutual duty" (presumably enforceable by the state through "force or violence") of "Christian" forbearance, love and charity."¹³ Thus, while promoting religious freedom in theory, arguably the Virginia Declaration undid its own premise by mandating a "duty" to obey the "Christian" religion to achieve it. Therefore, by inference, legislation encouraging a "Christian" lifestyle, such as a Sunday closing law (banning Sabbath work, as the Bible ordained),¹⁴ was necessary (or so its proponents plausibly could assert). Its presumed justification, would be to help fashion the "Christian forbearance" the Declaration declared was needed.

The second Virginia Sunday closing law paradox was that in its 1786 enactment year, the General Assembly had already adopted the famous "Jefferson's Statute," his "Statute on Religious Freedom," annulling prerevolutionary laws requiring any specific

¹² Earlier thesis examples included (1) the Babylonian "*shabuttu*" day of dread which became, instead, the Judeo-Christian "Sabbath" day of rest, veneration and rejoicing; (2) Sunday's biblical rest and veneration role, contrasted with a parallel tradition of Sunday markets and sports. See nn. 3-5 and 18, and accompanying text, **Chapter 3**, *supra*.

¹³ "Virginia Declaration of Rights," art. 16, quoted in text preceding n. 9, *supra*, this **Chapter**. Thomas E. Buckley, S.J., *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: Univ. Press of Virginia, 1977), 19, insightfully comments on this passage: "The Revolutionary convention could accept the concept of freedom of conscience, but it would not sever the special relationship which bound Virginians to the church of their fathers."

¹⁴ As discussed herein in text supported by n. 13, *ibid*.

religious practice. It also seemingly prohibited post-revolutionary statutes on the same subject, such as Sunday closing laws.¹⁵ Regarded by Jefferson as one of his three outstanding accomplishments,¹⁶ it provided in part:

That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor . . . suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, [which] . . . shall in no wise diminish, enlarge, or affect their civil capacities.¹⁷

This Jefferson-drafted enactment has been readopted *verbatim* in all Virginia statutory recodifications since its 1786 passage.¹⁸ Its plain meaning seemingly precluded governmental reliance on, or regulation or support of, Christianity or any religion. This contrasted with the Virginia Declaration's reliance on "Christian forbearance, love and charity," to achieve harmony. Thus, there was an apparent conflict of reasoning underlying these respective

¹⁵ But, cf. n. 11, this Chapter, *supra*.

¹⁶ See n. 1, Chapter 1, and supporting text, *supra*.

¹⁷ Adopted January 16, 1786, *Journal of the House of Delegates of Virginia* (Richmond, Va.: Samuel Shepherd, 1828), 143-144; January 16, 1786, *Journal of the Senate . . . of Virginia* (Richmond: Thomas W. White, 1827), 92. *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 717, 114 S.E. 764 (1922), incorrectly dated its adoption on December 16, 1785, actually the date setting its final legislative reading. See Daniel L. Dreisbach, "Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New light on the Jeffersonian Model of Church-State Relations," *North Carolina L. Rev.* (1990), 69:159-211, 169, n. 60.

¹⁸ Currently, Va. Code Ann. §57-1 (1950) (1995 repl. vol.) (annotating prior enactments). The statute "has been retained in its original form in every revision of the laws from . . . [its 1786 original adoption] until now. . . ," *Pirkey Bros.*, 134 Va. at 717 (1922).

enactments.¹⁹ This seemed resolved by later adoption of Jefferson's religious freedom statute, which discouraged legislating religious dogma into state policy. This was after and, therefore, presumably rescinded, the Virginia Declaration's seemingly contradictory principle of expressly requiring "Christian" forbearance for religious toleration.

However, as this paradox was seemingly resolved, the Assembly enacted another one, on November 27, 1786, the Virginia Sunday closing law, providing in part:

If any person on the sabbath day shall . . . be found labouring at his own, or any other trade or calling, or shall employ his apprentices, servants or slaves in labour or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence,²⁰

¹⁹ Note, however, *contra* analysis of some claiming Jefferson's statute permitted an "established" church. See n. 11, this **Chapter**, *supra*.

²⁰ "An Act for punishing disturbers of Religious Worship and Sabbath breakers," Hening, XII:336, 337. Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia," 198, at n. 11, this **Chapter**, *supra*, contended "Jefferson's use of . . . 'Sabbath' suggests the measure was inspired by religious concerns, as opposed to . . . promoting recreation and rest from secular employment." However, "Sabbath" was in the Act's title which, under Virginia law of the time, was generally not used to determine intent, unless there was ambiguity, as Jefferson, a practicing attorney, was undoubtedly aware: *Commonwealth v. Gaines*, 2 Va. Cas. 172, 180; 3 Va. Rpts. Ann. 188, 192 (Va. Gen. Ct. 1819) ("It is true that the title is no part of the law, and when plainly repugnant to the enacting clauses, has no weight, but it may be resorted to . . . remove an ambiguity" [applying a statute to 1786 conduct, the year of the closing law's enactment].) Accordingly, the closing law's title would be irrelevant for legal interpretation, according to case law applied to acts contemporary to its adoption. Dreisbach further noted, *supra*, this footnote at n. 67: "It is noteworthy that when the Virginia legislature enacted Bill 84 it apparently changed the fifth [sic, should be sixth?] word of this paragraph from "Sunday" to "Sabbath day." So Jefferson used "Sabbath" only in the act's title which, as a practicing attorney, he likely knew was not legally relevant to assess its meaning. He originally used what Dreisbach deemed the more secular "Sunday" in its text. Thus, Dreisbach's surmise of Jefferson's religious intent concerning the word "sabbath" appears contradicted by the evidence his own article references.

(continued...)

The statute was slightly amended on December 26, 1792, remaining largely unchanged thereafter until the 1960s.²¹ The Christian “day of rest” was, by its provisions, required to be honored by Virginians, whether Christians or not, through not working. That is, the text’s underlying logic appeared to foster Christianity through enforcing biblically-inspired sabbath work restrictions and thus, collaterally, facilitating worship on that day. As Dreisbach com-

²⁰(...continued)

Other background about this Act provides additional and needed context about it:

(1) Its adoption was wrongly given as 1779 in (a) *Mandell v. Haddon*, 202 Va. 979, 988, 121 S.E.2d 516 (1961) (citing no authority); and (b) *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 717, 114 S.E. 769 (1922) (citing *Hening*, XII:337). *Hening*’s page heading, however, *ibid.*, shows a 1786 enactment, not 1779. In contrast, its printed margin notes, *ibid.*, state: “From Rev. Bills of 1779, Ch. LXXXIV” [i.e., Chapter 84], referring to the 1779 committee Jefferson chaired, proposing Revolution-mandated statutory revisions, of which his religious freedom bill was No. 82, and the closing law No. 84.

(2) The Act’s 1786 adoption is detailed in Daniel L. Dreisbach’s 1990 article [see n. 17, *supra*, this **Chapter**, *N. Carolina L. Rev.* 69 (1990):159-211; 178-184, 190-193].

(3) Jefferson’s proposed revisions, “. . . faded into obscurity . . . from 1776 to 1786,” Editorial Note, *Papers of Thomas Jefferson*, Julian P. Boyd, ed. (31 vols. to 1800 as of 2004) (Princeton: Princeton Univ. Press, 1950) (“*Jefferson Papers*”), 2:305. As Jefferson explained, revising statutes was deferred to winning the Revolution: “[T]he first assembly . . . appointed a committee to revise the whole code This work has been executed . . . ; but probably will not be taken up till a restoration of peace” Thomas Jefferson, *Notes on the State of Virginia*, Frank Shuffleton, ed. (1785) (New York: Penguin Books, 1999) (“*Notes*”), 144. Thus, the Jefferson committee’s statutory revisions, proposed in 1779 (the seeming origin of the erroneous 1779 closing law adoption date in *Mandell*, *supra*, this footnote), were not enacted until 1786.

²¹ Samuel Shepard, *The Statutes at Large of Virginia: from October Session 1792 to December session 1806, inclusive, in three volumes (new series), being a continuation of Hening* (Richmond, Va: 1835, reprint, New York: AMS Press, 1970), I:193, December 26, 1792. This amendment restated the monetary forfeiture for violating the Act in dollars and cents, instead of in shillings, as its original enactment provided.

mented, the statute's use of "sabbath," the Judeo-Christian term for the religious day to which it applied, was arguably a governmental support of Judeo-Christian religion. (Dreisbach further pointed out, however, that legislators substituted "Sabbath" for the "Sunday" Jefferson had used.²²)

Nevertheless, the closing law seemingly contradicted Jefferson's religious freedom statute that decreed "no man shall be compelled to frequent or support any religious worship," nor be "restrained, molested, or burthened in his body or goods," for so doing, but instead "shall be free to profess . . . their opinions in matters of religion," which "shall in no wise diminish, enlarge, or affect their civil capacities." Certainly the closing law "restrained" citizens from ignoring Sunday as a legally mandated rest day. Refusing to so-recognize Sunday, after this law's passage also "diminish[ed]" one's "civil capacities," since labor on that day exposed one to forfeitures, resulting in being "restrained, molested or burthened in his body or goods" for so doing.²³

A third paradox about Virginia Sunday closing laws concerned Jefferson himself. His advocacy of virtual state abstention on religious matters, as in his Bill on Religious Freedom, seemed contradicted by his sponsorship and probable drafting of post-revolutionary Virginia's first Sunday closing law. A meticulous examination of original documents led Julian P. Boyd, editing Jefferson's papers, to conclude that "Jefferson drew Bills No. [thereinafter are

²² See n. 20, this **Chapter**, *supra*.

²³ Quotations in this paragraph are extracted from Jefferson's statute, as quoted more fully herein at n. 17 and accompanying text, this **Chapter**, *supra*.

listed 51 numbered bills, including the Sunday closing law, No. 84].”²⁴

Daniel Dreisbach, a student of this statute, concluded:

Bill 84 and Sunday closing laws in general arguably discriminate against individuals who choose not to preserve the . . . “day of rest” observed by most Christians. Acknowledgment of the Christian “Sabbath” . . . and its preservation by law conflicts with a strict separationist ban on state support for organized religion Modern advocates of church-state separation have criticized Sunday legislation less restrictive than Bill 84 as a breach in the “wall of separation” Bill 84 also suggests that Jefferson’s desire to separate the institutions of church and state . . . was merely a means of achieving the fullest . . . freedom of religious expression. If religious liberty was realized in its richest sense through cooperation between the state and the church, then Jefferson, it would seem, endorsed such a limited union.²⁵

Dreisbach cited only secondary sources for his conclusions. This, however, should not detract from the merit of the issue raised: Why would Jefferson either draft or ratify, as chair of the committee charged with its drafting, a statute largely prohibiting Sunday work, seemingly contradicting the Virginia religious freedom act he also had drafted?

Discerning Jefferson’s intentions in pursuing these seemingly conflicting policies is therefore pertinent in studying Virginia’s 1786 adopting of its first Sunday closing law. Jefferson and his ideas, however, did not exist in a vacuum, so that **Chapter 5(c)**, immediately hereinafter, offers a small sampling of the divergent views then existing.

²⁴ Boyd, ed., *Jefferson Papers*, 2:318-320 (see n. 20(3), *supra*, this **Chapter**). Even if Jefferson did not personally draft the closing law, editor Boyd’s discussion, *ibid*, makes clear Jefferson’s extensive review of, and apparent approval of, its final form.

²⁵ Daniel L. Dreisbach, “Religious and Legal Reforms in Revolutionary Virginia [etc],” 198-199, (footnotes omitted), n. 11. Dreisbach’s earlier study of the first post-revolutionary Virginia closing law is in a 1990 article, see n. 17, Both footnotes are in this **Chapter**, *supra*.

(c) Complexity of Church/State Interrelation Attitudes in America in the Immediate-Post-Revolutionary War Era.

The complexities of divergent American Post-Revolutionary War attitudes about permitted relations, if any, between church and state, are illustrated by these seemingly conflicting viewpoints: Justice Brewer, writing for a unanimous United States Supreme Court in 1892, but citing authority nearly a century older, declared the United States “a Christian nation.”²⁶ In contrast, the United States Senate ratified in 1797,²⁷ a treaty with Tripoli asserting that “the Government of the United States of America is not, in any sense, founded on the Christian religion.”²⁸ These both constitute actions taken, seemingly without dissent, by powerful government entities, yet simultaneously pointing, metaphorically, in opposite

²⁶ Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (Brewer, J., for unanimous Court). See also, *Zorach v. Clauson*, 343 U.S. 306, 313 (1961) (Douglas, J., for Court): “We are a religious people whose institutions presuppose a Supreme Being.” (dissenting opinions filed by Black, Frankfurter and Jackson, JJ.)

²⁷ The United States Senate’s power to ratify treaties by two-thirds of Senators present, was apparently the basis for a later congressional consensus that the ability of the Senate to approve a Constitutional amendment by two-thirds vote, meant two-thirds of Senators present, and not two-thirds of the entire body. David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution* (Univ. Press of Kansas, 1996), 116.

²⁸ Article 11, Treaty between the United States and Tripoli, January 3, 1797, reaching the Senate on May 26, 1797, *American State Papers, Foreign Relations, Documents Legislative and Executive of the Congress of the United States* (Washington, DC: Gales and Seaton, 1832), II:18-19. The Senate’s undissenting treaty adoption on June 7, 1797, is in *Journal, The Executive Proceedings, The Senate, The United States of America* (Washington, D.C.: Duff Green, printed by Senate order, 1828); I:244: “(23 affirming votes): (two-thirds of the Senators present concurring therein,) *Resolved*, That the Senate do advise and consent to the ratification of the treaty of peace and friendship between the United States of America and the Bey and subjects of Tripoli, of Barbary.”

directions concerning religion's permitted influence upon that government.

(1) Judicial Assertion of America as a “Christian” Nation.

The 1892 assertion of America as a “Christian nation” is in the United States Supreme Court’s *Church of the Holy Trinity* opinion, deciding if the defendant Church violated a federal statute criminalizing “assist[ing]” in “importation” of an “alien.”²⁹ This was alleged because the Church hired as its rector a British subject and resident (therefore an American “alien”), whose acceptance of the post for which he was hired necessarily caused his “importation” into the United States to take the position.

The Court held the statute applied only to “cheap, unskilled [manual] labor,” not “importation” of “brain toilers” like the rector, and dismissed the indictment. This disposed of the case’s only issue and should have ended the opinion. However, Justice Brewer had more to say, even though, following his above-described holding, there was no need to say it.³⁰ He volunteered that it was “historically true,” beyond the statutory analysis and holding just-summarized, no action against religion could be imputed to any American legislation, state or national, because this is a “religious people” and a “Christian nation.” Therefore, he inferred, for a unanimous Court, that Congress could not have “intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister

²⁹ 143 U.S. at 458.

³⁰ The American common law defines such a statement as “obiter dictum,” meaning “judicial comment made during the course of delivering a judicial opinion, . . . unnecessary to the decision . . . and therefore not precedential (though it may be persuasive),” s. v. “obiter dictum,” *Blacks Law Dictionary*, 7th ed.

residing in another nation.”³¹ His dictum³² implied Christianity possessed an inchoate prior-claim over American law. It suggested, in effect, that Christianity was intended by America’s predominantly-Christian legislators as inherent in their statutory output, though not expressly stated in any given statute nor, indeed, in the Constitution itself.

In so-concluding, the Court quoted *Vidal v. Girard’s Executors*, that “the Christian religion is a part of the common law of Pennsylvania;”³³ the 1811 opinion by New York’s famed Chancellor Kent in *People v. Ruggles* on Christianity’s legal primacy,³⁴ and the

³¹ 143 U.S. 457, 471. The thesis sentence supported by this footnote asserts that the Court “inferred” the rejection of the quoted conclusion, because it was rendered in the opinion as a question, which was then answered with prolixity in the negative.

³² See n. 30, *supra*, this Chapter.

³³ 43 U.S. (2 How.) 127, 198 (1844); quoted in *Holy Trinity* at 471.

³⁴ *Holy Trinity* at 471. Chancellor Kent wrote in *People v. Ruggles*, 8 Johns. 290, 294, 295 (N.Y., 1811): “The people of this State, in common with the . . . country, profess the general doctrines of Christianity as the rule of their faith and practice, and to scandalize the Author of these doctrines is not only, in a religious point of view, extremely impious, but, even, in respect to the obligations due to society, is a gross violation of decency and good order.” Kent’s biographer, however, John Theodore Horton, *James Kent: A Study in Conservatism, 1763-1847* (New York: D. Appleton-Century for the American Historical Ass’n, 1939; Reprint, De Capo Press for *The American Scene, Comments and Commentators*, Wallace D. Farnham, gen. ed., 1969), 192, wrote that Kent “in the privacy of his club, had spoken of Christianity itself as a vulgar superstition from which cultivated men were free.” Horton’s source was, *ibid* at 115, an acquaintance of Kent’s: “The playwright and painter, William Dunlop, recorded in his diary: ‘Kent remarked that men of information were now nearly as free from vulgar superstition or Christian religion as they were in ye [sic] time of Cicero from pagan superstition—all, says he, except literary men among the clergy [bracketed insertion by Horton],’” *Diary I*, 151, September 30, 1797, identified in Horton’s bibliography, *ibid*, 330, as: “Printed Sources other than Newspapers and Law Journals, . . . The Diary of William Dunlop, 1766-1829, Collections of the New York Historical Society, N.Y., 1930.” Horton thus-reconciled Kent’s public praising and private disparaging of
(continued...)

Pennsylvania Supreme Court's admonition that "general Christianity, is and always has been, a part of the Common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts, but Christianity with liberty of conscience to all men."³⁵

While *Holy Trinity's* "Christian nation" dictum was hailed by many Christian religious groups,³⁶ appellate trends concerning it were in the opposite direction. Andrew J King surveyed nineteenth century Sunday closing law appellate cases, analyzing rationales for them given by then-contemporary legal commentators. He concluded, quoting former Michigan Supreme Court Justice Thomas Cooley, a noted legal scholar of the time, that as the nineteenth century progressed, "laws against the desecration of the Christian Sabbath by labor or sports" were "not so readily defensible. . . ."³⁷ Consistent with this analysis, courts relying on a "Christian nation" rationale to uphold enactments like closing laws, King noted,

³⁴(...continued)

Christianity: "If he [Kent] held that opinion, then his comments on religion from the bench were sincere only as they expressed an aristocratic conviction that religious faith is useful as a buttress of the social order. To that theory of the case, his hatred of Jefferson and his constant fear of Jacobinical commotion lend support." *James Kent*, 192-193.

³⁵ *Holy Trinity* at 471, quoting *Updegraf v. Commonwealth*, 11 Serg. & Rawle 394, 400 (Pa. 1824).

³⁶ Articles praising *Holy Trinity's* "Christian nation" dictum collected in William A. Blakely, Compiler and Annotator, *American State Papers Bearing on Sunday Legislation*, rev. ed., Willard A. Colcord, ed. (Washington, D.C.: General Conference Corporation of Seventh-Day Adventists, 1911; New York; reprint, De Capo Press, 1970), 508, n. 1.

³⁷ Quoted from Cooley, *Treatise on the Constitutional Limitations* (6th ed. 1890), 584, in Andrew J. King, "Sunday Blue Laws," *Albany L. Rev.* 64 (2000):675, 677-678, for the receding of religion as a basis for decisions supporting Sunday closing laws. Justice Cooley is quoted in n. 20 part (3), *supra*, this **Chapter**, in another context.

markedly declined as the century progressed. Instead, they were sustained as health and welfare measures. “Christian nation” rationales usually, he found, were *obiter dictum* afterthoughts, not dispositive of the cases.³⁸

(2) Tripoli Treaty: America Not “Founded on the Christian Religion.”

Article 11 of the 1797 United States-Tripoli Treaty provides, in part:

As the Government of the United States of America is not in any manner founded on the Christian religion, the said Government, shall ever produce an interruption of the harmony existing between the two countries.³⁹

The first line and a half of the above-quoted Treaty provision suggested a total divorce between Christianity and the federal government. This was contrary to the tenor of Justice Brewer’s *Holy Trinity* “Christian nation” dictum⁴⁰ and the authority he cited to support it (roughly contemporaneous with, though slightly later than, the Treaty’s 1797 ratification).⁴¹

In the late 1920s, however, this Treaty was subjected to a State Department-com-

³⁸ Ibid, n. 37. For “obiter dictum,” in this footnoted sentence, see n. 30, *supra*, this **Chapter**.

³⁹ May 26, 1797, *American State Papers, Foreign Relations, Documents Legislative and Executive of the Congress*, II:18-19, n. 119, *supra*, this text. The treaty was republished in *Appendix, Debates and Proceedings in the Congress of the United States, containing Important State Papers and Public Documents and all the Laws of a Public Nature, 5th Congress (May 15, 1797 to March 3, 1799)* (Washington: Gales & Seaton, 1851) (“*State Papers*”), 3:3095.

⁴⁰ See text preceding n. 26, *supra*, this **Chapter**.

⁴¹ The treaty was adopted on June 7, 1797, by the Fifth Congress, whose term was from May 15, 1797, through March 3, 1799. See, title page, *State Papers*; n. 28, *supra*, this **Chapter**.

missioned review, as part of a comprehensive retranslation and study of original texts and supporting documents of all treaties since the nation's founding. This included the Tripoli Treaty's original arabic, retranslated by specialists. The study concluded this Treaty's original eighteenth-century translation to English, directed by Joel Barlow, the United States Counsel General at Algiers during its negotiation, had "defects throughout . . . obvious and glaring." In particular, it concluded, the above-quoted Article 11 (asserting America as "not founded" on the "Christian religion"), "does not exist at all. There is no Article 11."

Implausibly but truly, the Barlow translation, no matter its defects, including its bogus Article 11, was the treaty-version presented to the Senate for its constitutionally-required ratification in 1797, remaining the official English text thereafter.⁴² That text, including

⁴² This Tripoli treaty review is in United States Department of State, *Treaties and other International Acts of the United States of America*, 5 vols, Hunter Miller, ed. (Washington, D.C.: Government Printing Office, 1931), 2:384, from which quotations and details in text this footnote supports were taken. Here is a fuller quotation (emphasized "the" in line 2 is in the original):

[T]he Barlow translation . . . submitted to the Senate . . . and . . . the Statutes at Large . . . always been deemed *the* [English] text. . . is at best a poor . . . summary of . . . the Arabic; . . . [with] defects . . . obvious and glaring. Most extraordinary (and wholly unexplained) is . . . that Article 11 . . . , with its famous phrase, "the government of the United States . . . is not in any sense founded on the Christian Religion" does not exist at all. . . . The Arabic text . . . between Articles 10 and 12 is . . . a letter, crude and flamboyant and . . . quite unimportant, from the Dey of Algiers to the Pasha of Tripoli. How that . . . came . . . to be regarded . . . as Article 11 . . . , is a mystery Nothing in the diplomatic correspondence throws any light . . . on the point. [¶] A further . . . mystery is . . . that . . . the Barlow translation has been . . . accepted as . . . equivalent of the Arabic. . . .

(continued...)

concededly bogus Article 11,⁴³ the Senators, the referenced State Department's 1931 study

⁴²(...continued)

This account, *ibid*, was praised for "important corrections in [the treaty's] translations . . . [with] most enlightening notes . . . of great value." Samuel Flagg Bemis and Grace Gardner Griffin, *Guide to the Diplomatic History of the United States, 1775-1921* (Washington, D.C.: U. S. Government Printing Office for the Library of Congress, 1935; reprint, Gloucester, Mass.: Peter Smith, 1963), 159 (Bemis was Yale University's Farnam Professor of Diplomatic History on the *Guide*'s 1935 publication date).

⁴³ The State Department report termed bogus Article 11 "a mystery [about which] [n]othing in the diplomatic correspondence throws any light . . .," n. 42, *ibid*.

(1) Arguably, Joel Barlow, America's then-counsel-general in Algiers, added bogus Article 11, but supporting evidence is lacking. Barlow's 1797 "skillful negotiations" released American sailors the Barbary Pirates enslaved. Thomas A. Bailey, *The Diplomatic History of the American People*, 10th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1980), 1004 (Appendix, sources and commentary on Chapter V). He was condemned, however, by his Yale classmate, Noah Webster, among others, for "atheism and licentiousness," Arthur L. Ford, *Joel Barlow* (New York: Twayne, 1971), 36, and for Jeffersonian deistic, political and social views, *ibid*. Barlow wrote his wife during Treaty negotiations that if he, "through intoxication or some other accident" entered a mosque whereupon, on pain of death, Tripolitan law supposedly required conversion to Islam, he would become "a Mohammedan on the spot, for I have not enough religion of any kind to make me a martyr," quoted by James Woodress, *A Yankee's Odyssey: The Life of Joel Barlow* (New York: Greenwood, 1958), 164 (emphasis added).

(2) Joe Barlow's views on the connection between religion and freedom are also expressed in: *Advice to the Privileged Orders in the Several States of Europe. Resulting from the Necessity and Propriety of a General Resolution in the Principle of Government* (1792) (Reprint, Ithaca, NY: Cornell Univ. Press, 1956), 23: "The existence of any kind of liberty is not compatible with any kind of church. By liberty I mean the enjoyment of equal rights and by church I mean any mode of worship declared to be national or declared to have any preference in the eyes of the law." Quoted in Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb, Ill: Northern Ill. Univ. Press, 2004), 127, n. 85.

(3) These quotations show Barlow lacked fixed religious views and, while far from proof he inserted bogus Article XI, are enough to fairly characterize him as a suspect.

concluded,⁴⁴ relied upon as correct in ratifying it.⁴⁵

One can speculate that, even though not agreeing with the treaty's Article 11, the Senators may have ratified it to speedily end Barbary commerce raiding and retrieve enslaved American crews. Alternatively, they could have viewed Article 11 as unimportant, compromising no American rights worth the delay to negotiate its change.⁴⁶ All things considered, however, it is reasonable to conclude that the Senators approved Article 11 without dissent because they genuinely agreed with what it said: There was no foundational relationship between the United States government and the Christian religion.

A review of the Senate leaders ratifying the 1797 Tripoli treaty renders it difficult to believe they would casually consent to Article 11 if it did not reflect their views of core American political values. Four Senators in the Fifth Congress ratifying the Treaty had been Senators in the First Congress (March 1, 1789 to March 3, 1791), where what became the

⁴⁴ See n. 42, and accompanying text, *supra*, this **Chapter**, where the study is quoted.

⁴⁵ There were sixteen states at the 1797 treaty ratification, with two Senators per State. Thus, 32 Senators comprised the Senate. *Biographical Directory of the American Congress, 1774-1996*, Joel D. Treese, ed. (Alexandria, Va.: CQ Staff Directories, Inc., 1997) ("*Biographical Directory of Congress*"), 50. Thus the treaty's 23 ratifying votes exceeded two-thirds of the members, satisfying U.S. Const., art. II, § 2, cl. 2, that "two-thirds of the Senators present concur."

⁴⁶ A powerful incentive for Senate ratification was the cost of maintaining the navy, greatly expanded to fight the Barbary piracy. There was anticipation that the Treaty, by ending the piracy, would allow reduction of this expense. See the discussion in Ray W. Irwin, *The Diplomatic Relations of the United States with the Barbary Powers, 1776-1816* (Chapel Hill, N.C.: Univ. of N. Carolina Press, 1931), 79-80.

Constitution's first ten amendments ("Bill of Rights") were proposed in 1789, including the now First Amendment's prohibition against governmental "establishment of religion," or limitation of its "free exercise."⁴⁷ This arguably gave them a clear understanding of the nature of church/state separation that Amendment intended. Of these four "Fifth Congress" Senators who also were "First Congress" Senators, two voted for the Tripoli treaty.⁴⁸

One of these two Senators was New Hampshire's John Langdon, a signatory of the 1787 federal constitution, and a company commander at the Battle of Concord. Langdon was also first president *pro tem* of the United States Senate, and administered the first presidential oath to George Washington. He was a member of his state's constitutional ratifying convention and, after his Senate service, a five-term New Hampshire governor.⁴⁹ The other Tripoli treaty-ratifier who was a First Congress Senator, was Rhode Island's Theodore Foster, a lawyer and later trustee of his alma mater, Brown University.⁵⁰

⁴⁷ David E. Kyving, *Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence, KS: Univ. Press of Kansas, 1996), 105, n.68. The members of the U.S. Senate and House of Representatives in each Congress are set out, by state, with biographies, in the *Biographical Directory of Congress*, supra, n. 45, this **Chapter**, supra, most importantly for this paper, the First Congress, *ibid*, 41, when the Bill of Rights was proposed, and the Fifth Congress, *ibid*, 50, when the Tripoli treaty was ratified.

⁴⁸ Philip John Schuyler, third of the four "Fifth Congress" Senators who also served in the "First Congress" Senate, resigned due to ill health January 3, 1798, dying thereafter. *Biographical Directory of Congress*, 1790 (n. 45, supra, this **Chapter**). Senate voting records near the Tripoli treaty's ratification reveal his continuing absence. His failure to vote on the treaty, therefore, suggests absence due to illness, not disapproval of its terms.

⁴⁹ *Biographical Directory of Congress*, 1363, at n. 45, supra, this **Chapter**.

⁵⁰ *Ibid*, at 1032. Foster only became a Senator on June 25, 1790, *ibid*, 42, n. 24.

Five other "Fifth Congress" Senators (Bloodworth of North Carolina, Goodhue of Massachusetts, Laurence of New York, Sedgwick of Massachusetts, and Vining of Delaware), served in the First-Congresses House of Representatives. Of these, all but Vining voted for the Treaty's ratification. Two of these Senators merit additional comment: (1) Theodore Sedgwick of Massachusetts, a Yale graduate and attorney, was President pro-tem of the Fifth Congress Senate, a member of the Massachusetts convention adopting the Constitution, and served in the 1775-1776 American expedition to Canada; and (2) John Laurence of New York, an English immigrant and attorney, was a Continental officer, appointed chief Judge Advocate by Washington. He presided at the 1780 court martial convicting British Major John Andre' to hang as a spy, arising from the latter's go-between role in Benedict Arnold's treason.⁵¹

The common thread of Sedgwick's and Laurence's service is of practical men risking their lives for patriotic ideals. The Canadian expedition Sedgwick experienced and the Andre' court martial Laurence adjudged, suggested, in separate ways, their high degrees of intestinal fortitude. The harrowing expedition Sedgwick endured resulted in American defeat, retreat and pursuit by an avenging enemy, causing many deaths and imprisonments.⁵² Pre-

⁵¹ For First Congress Representatives serving as Fifth Congress Senators, see, *ibid*, 41-42; and 50-51. For biographical information in footnoted paragraph concerning Senators Laurence and Sedgwick, see *Biographical Directory of Congress*, 1371, 1799, n. 45, *supra*, this **Chapter**. Each was also, at various times of the Fifth Congress, *President pro tem* of the Senate, *ibid*, showing the respect with which they were held by their Senate peers.

⁵² Arnold's November 27, 1775, thumbnail description of the march to Quebec, ne-
(continued...)

siding at the court martial hanging British commanding general Sir Henry Clinton's favorite aide, Major John Andre', put Laurence at risk had Clinton prevailed over Washington.⁵³ Those like Laurence and Sedgwick apparently steeled themselves to such dangers for reasons of conscience. While such circumstances cannot prove, with geometric precision, the intent of the Senators ratifying the Treaty, it supplies reasons to believe they would not do so flipantly, without circumspection, on declarations of conscience like Article 11. That Article's

⁵²(...continued)

ver challenged for accuracy despite his later treason, was:

Thus . . . we completed a march . . . not to be paralleled in history; the men having with the greatest fortitude . . . wad[ing] almost the whole way . . . over hills . . . and bogs almost impenetrable, . . . [s]hort of provisions, . . . ; famine . . . and enemy's country and uncertainty ahead. [The] . . . officers and men inspired . . . with the love of liberty and their country, pushed on with a fortitude superior to every obstacle

Quoted by Kenneth Roberts, compiler and annotator, *March to Quebec, Journals of the Members of Arnold's Expedition*, rev. ed. (Garden City, N.Y.: Doubleday, 1947), 98-99.

Expedition doctor Lewis Beebe observed: "No person can conceive the distress our people endured the winter past, nor was it much less at the time of their retreat." Lewis Beebe, "Journal," May 12, 1776; Thomas Fleming, 1776, *Year of Illusions* (New York: Norton, 1975), 222, citing, at n. 9, *ibid*, Frederick R. Kirkland, ed., "Journal of a Physician on the Expedition against Canada, 1776," *Pennsylvania Mag. of Hist. & Biog.*, 59 (Oct 1935):325.

⁵³ The danger Laurence faced was revealed in this extract from an October 1, 1780 Benedict Arnold letter for Sir Henry Clinton to George Washington: "[F]orty of the principal inhabitants of South Carolina have justly forfeited their lives" for revolutionary activity, and Clinton could not "in justice extend his mercy to them . . . if Major Andre' suffers," Willard Sterne Randall, *Benedict Arnold: Patriot and Traitor* (New York: Wm. Morrow, 1990), 567. Randall concluded, *ibid*: "In other words, Arnold . . . threatened . . . forty-to-one retaliation on hostages if Andre' was executed." Thus, had the British captured Judge Advocate John Laurence (later Senator Laurence when ratifying the 1797 Tripoli treaty), he had reason to fear death for his role in the Andre' court martial.

stark assertion was that the United States was not founded upon the Christian religion. Given these ratifying Senators' leadership positions, it seems equally difficult to believe their support of that provision did not influence their colleagues and constituents. Accordingly, the Senate's 1797 ratification of this Treaty is deemed significant in reflecting national views of the time on the relation between government and religion.

While senate votes on this treaty cannot incontrovertibly prove popular inclination toward church/state separation, it is suggested those so-voting were not doing it lightly. As might be expected, however, the sentiments reflected in the Tripoli treaty vote cannot be deemed the whole story. There were other viewpoints to consider, even in this necessarily cursory treatment ultimately focused on the narrower Sunday closing law question.

(3) Possible Reconciliation of Jefferson's Seeming Inconsistencies Concerning Government and Religion.

Truncated examples were just given of America as a "Christian nation" in the *Church of the Holy Trinity* decision and the Tripoli Treaty provision asserting, to the contrary, an America not "founded on the Christian religion." They illustrated the existence, virtually simultaneously, near the time of the Virginia closing law's adoption, of powerful, yet contradictory, social inclinations toward governmental attachment to, versus separation from, organized religion.

Jefferson certainly was aware that many Virginians were allied to each of these competing trends. Supporting closer association of government and religion, for example, was the Patrick Henry-backed proposal for tax assessments for religious education, ultimately

defeated, in part, by Jefferson's political colleague, James Madison's, anonymously circulated petition.⁵⁴ Reflecting, in contrast, movement toward government-religion separation, was the General Assembly's refusal to allow churches to incorporate.⁵⁵

Contrary to Dreisbach's assertion,⁵⁶ however, it seemed unlikely that Jefferson thought, even tentatively, that "religious liberty was realized in its richest sense through co-operation between the state and the church,"⁵⁷ or that this explained his drafting Virginia's Sunday closing law. Such were not Jefferson's expressed views in his *Notes on the State of Virginia*, whose writing and publication straddled the 1786 enactment of the Virginia Sunday closing law he drafted.⁵⁸ There he wrote:

But our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not

⁵⁴ James Madison, "Memorial and Remonstrance," 1785, *The Constitution and Religion*, Robert W. Alley, ed. (Amherst, N.Y.: Prometheus, 1999), 18-19, 29-34.

⁵⁵ Thomas E. Buckley, S.J., "After Disestablishment: Thomas Jefferson's Wall of Separation in Antebellum Virginia," *Journal of Southern History*, 61(1995):445, 451-480.

⁵⁶ See Dreisbach's text quoted immediately before n. 25, where the phrase quoted in the footnoted sentence appears in context. His text, however, and his article containing it, did not consider Jefferson's views expressed in *Notes on the State of Virginia* (n. 59 and accompanying text, *infra*), although he cited the *Notes* on another issue on p. 182, n. 84, in his 1990 *North Carolina Law Review* article (n. 17, *supra*) examining Jefferson's religious freedom statute and Sunday closing law. (All footnote references, *supra*, except n. 84 in the *North Carolina Law Review* article, are in this Chapter.)

⁵⁷ Dreisbach, text preceding n. 25, *supra*, this Chapter.

⁵⁸ Jefferson wrote *Notes on the State of Virginia* principally in 1781, published, after his revisions, in 1787. Thomas Jefferson, *Notes on the State of Virginia*, Frank Shuffleton, ed. (New York: Penguin, 1999) ("Notes"), "Introduction," xii-xvi. Joseph L. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1998), 85.

submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour [sic] to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg. . . . Constraint may . . . fix him obstinately in his errors, but will not cure them. Reason and free enquiry are the only effectual agents against error. . . . [T]hey will support true religion, by bringing every false one . . . to the test of their investigation. They are the natural enemies . . . of error only. . . . If [free inquiry] . . . be restrained now, the present corruptions will be protected and new ones encouraged.⁵⁹

Thus, according to Jefferson, government “cooperation” to achieve religious liberty, as Dreisbach described, was achieved by the government’s staying out of the way of religions or popular deliberations about religion. Instead he advocated allowing citizens untrammelled freedom to decide these matters themselves. Assuming, for argument’s sake, this is true, however, then the Jefferson-drafted Sunday closing law certainly appeared contrary to the spirit, if not substance, of his religious freedom statute.

Other Jeffersonian views, in contrast, appeared congenial to government support of organized religion. For example, he urged using his local courthouse as “the common temple, one Sunday in the month to each [denomination].” There, he continued:

Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others’ preachers, and all mix in society with perfect harmony.⁶⁰

Jefferson also proposed that his prized creation, the University of Virginia, a state

⁵⁹ Thomas Jefferson, *Notes*, Frank Shuffleton, ed., 165; n. 58, *ibid*, and accompanying text.

⁶⁰ Thomas Jefferson letter to Dr. Thomas Cooper, November 2, 1822, *The Writings of Thomas Jefferson*, 20 vols.; Andrew A. Lipscomb and Albert Ellery Bergh, ed. (Washington, D.C.: Thomas Jefferson Memorial Ass’n, 1903), 15:404.

institution, allow religious groups to establish separate on-campus religious schools. He would have permitted “students to attend religious exercises with a professor of their particular sect,” while also attending “scientific lectures of the University.”⁶¹ Further, Jefferson not only did not object to Sunday religious services at the United States Capitol but attended himself, though his biographer Merrill Peterson claimed this was merely to allay “criticism of his friendliness with [Thomas] Paine,” condemned by many for atheism.⁶²

All this, however, left unexplained Jefferson’s seemingly contradictory views simultaneously held about interrelations of church and state. Joseph Ellis wrote of Jefferson’s tendency “to invent and then embrace” what Ellis called “seductive fictions,” and “play fast and loose with historical evidence on behalf of a greater cause.”⁶³

Although evidence remained murky for this thesis as it was also for past investigations, the “greater cause” in this instance seemed to have been achieving greater societal religious freedom through creating, in part through a Sunday closing law, an improved ethi-

⁶¹ Thomas Jefferson, “Freedom of Religion at the University of Virginia,” October 7, 1822, Saul K. Padover, *The Complete Jefferson* (New York: Duell, Sloan & Pearce, 1943), 957.

⁶² Merrill D. Peterson, *Thomas Jefferson*, 713, n. 1, **Chapter 1**, *supra*, this thesis.

⁶³ Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1998), 33. Jefferson was less charitably described in sources Bernard Bailyn collected, *To Begin the World Anew: the Genius and Ambiguities of the American Founders* (New York: Knopf, distributed by Random House, 2003), 38 (footnotes omitted): “John Quincy Adams . . . conceded that Jefferson had an ‘ardent passion for liberty and the rights of man’ but denounced him for infidelity, ‘pliability of principle,’ and double dealing. . . . Hamilton . . . [,] Jefferson’s chief enemy[.]. . . feared what he called the Virginian’s fanaticism and believed he was ‘crafty’ and a ‘contemptible hypocrite.’”

cal climate. Analysis supporting such a view was offered by A. James Reichley:

Some of the positions on . . . religion in public life taken by Jefferson at different times were simply inconsistent, as he himself would probably have acknowledged, attributing the inconsistencies to changes of mind or to pressing political needs of the moment. His overall view, however, though based on two sets of values in natural tension, was not necessarily inconsistent. Jefferson firmly believed that government should be barred from acting . . . as arbiter of religion; but . . . that a free society. . . uphold[ing] personal freedom . . . requires moral sustenance from a religious culture. These beliefs . . . can exist together within a consistent social philosophy, though they may pull against each other in ways that require difficult constitutional adjustments.⁶⁴

Thus, one explanation for Jefferson's apparently inconsistent views on church-state relations, is as an amalgam of his beliefs in (1) some kind of divine providence; (2) freedom of inquiry (even to the extent of rejecting most of (1) if one chose to do so); (3) the attempted accommodation of vastly differing philosophical views for political expediency; and (4) society's need for "moral sustenance" from a "religious culture."

To simply say, however, that Jefferson advocated a "religious culture," does not adequately convey what he meant. His humanist views about "free enquiry," sharply contrasted with earlier English Puritan ideas about the centrality of the Judaic-Christian scriptures to society's sound operation.⁶⁵ Further, though Jefferson's interest in religion was intense, his religious views were anything but conventional for either his time or for most

⁶⁴ A. James Reichley, *Religion in American Public Life* (Washington, D.C.: Brookings Institution, 1985), 96.

⁶⁵ Concerning "free enquiry," see portion of Jefferson's text from *Notes on the State of Virginia*; quoted preceding n. 59, *supra*, this Chapter.

practicing Christians today. He created, for example, a bible of his own editorial design, omitting Christ's resurrection or New Testament miracles, concepts Jefferson rejected.⁶⁶

Jefferson was unable to exert any in-person influence for the 1786 adoption of his Bill for Religious Freedom and the Sunday closing law, having been serving as American Minister to France in Paris since 1784.⁶⁷ For enactment of statutory revisions proposed by the 1779 committee of "revisors" he chaired, he relied on James Madison, his "faithful lieutenant," with a "keener sense of realities," and "more patience with the drudgeries of politics" than Jefferson. Madison's was also considered more adept than Jefferson at "political maneuvering [that] was an integral part of Virginia's political process."⁶⁸

Among Madison's strengths in obtaining enactment of many of the proposals of the "revisors" committee Jefferson chaired was his "idealism" which, nonetheless, "did not allow him to ignore the realities of politics." The two opposed a conservative-inspired assessment bill to support religion with taxes, provoking conservative opposition to the 118

⁶⁶ "To Jefferson . . . , miracles violated God's laws of nature, something [he was] . . . sure God would never do. . . . To . . . rationalists, Jesus' virgin birth and other miracles . . . did not prove him to be the Son of God, but . . . an 'illegitimate imposter' [which he rejected]. . . . It was sinful men, not God, who killed Jesus. . . . Jefferson [believed] . . . Jesus was not a divine being but the greatest man that ever lived, for he omits the New Testament accounts of Jesus resurrection, subsequent appearances, and ascension." Charles B. Sanford, "The Religious Beliefs of Thomas Jefferson," 64-65, *Religion and Popular Culture in Jefferson's Virginia*, Garrett Ward Sheldon & Daniel L. Dreisbach, ed. (Lanham, Md.: Rowman & Littlefield, 2000) (this author an ordained minister), *ibid*, 236.

⁶⁷ Peterson, *Thomas Jefferson and the New Nation*, 286; n. 1, **Chapter 1**, *supra*.

⁶⁸ *Ibid*, 266.

bills Jefferson and his revisors proposed. As explained by Madison's editors:

[Madison] presented 118 bills in the Revised Code early in the session in the hope of completing the long-unfinished business. The legislature [in 1785] slowly progressed through the bills until conservative, pragmatic Virginians balked at Jefferson's bill on crimes With little time left, [Madison] decided to postpone the majority of the bills in favor of trying to pass the most important, among them the bill for religious freedom.⁶⁹

Among these "most important" bills that Madison presented for passage was the Sunday closing law or, as titled in an October 31, 1785, printed copy prepared for the House of Delegates, "A bill 'for punishing disturbers of religious worship and sabbath breakers.'"⁷⁰ As earlier discussed herein, it was ultimately adopted by the legislature, through Madison's efforts, on November 27, 1786.⁷¹

Madison's just-described proclivities for "political maneuvering" (i.e., compromise) as "an integral part of Virginia's political process" and his declining "to ignore the realities of politics" suggests another reason that could have induced him to offer Jefferson's Sunday closing law for legislative adoption and worked for its passage. Such a law could have been a means to counter conservative Virginians' concerns about Jefferson's and Madison's (a) sponsorship of the religious freedom bill, and (b) opposing conservative religious assessment

⁶⁹ Robert A. Rutland and William M. E. Rachal, ed., *Papers of James Madison*, 17 vols (Chicago: Univ. of Chicago Press, 1973) ("*Madison Papers*") "Editorial Note," 8: 390 (10 March 1784 - 28 March 1786) (includes quotations in text paragraph immediately preceding footnoted paragraph).

⁷⁰ *Madison Papers*, 8:394.

⁷¹ See nn. 17 and 20 parts (1) through (3) and accompanying text, *supra*, this Chapter.

proposals. Introducing a Sunday closing law affording ordinary citizens a day of rest their employers could not countermand, because it had the force of law; which also addressed religious concerns of Virginia's conservatives through penalizing sabbath work, could have been Jefferson's motivation.

While no documentary proof can be presented that such motives of political compromise underlay Madison's proposal of Virginia's Sunday closing law, it certainly offered possible political solutions for the Jeffersonians. Despite requiring general abstention from Sunday work, Jefferson's closing law, unlike Virginia's colonial versions, contained no parallel requirement for mandatory religious observances.⁷² Thus, for followers of the Enlightenment, like Jefferson and Madison, it could be supported as a public welfare measure to achieve one day per week of mandatory rest, paralleling other public welfare statutes Jefferson's "revisors" drafted for Assembly consideration.⁷³ On the other hand, for conservatives such as war-time Governor Patrick Henry, a supporter of the religious assessment bill, it legally sanctioned punishing businesses, entertainments and other activities interfering with Sunday worship. Even though it did not require such worship, it at least potentially mitigated Sunday secular diversions that distracted citizens from worship. Thus the Sunday closing law, in part, could have been calculated to achieve compromise and, chameleon-like,

⁷² See, for example, nn. 37-39 and accompanying text, **Chapter 4**, *supra*.

⁷³ Among the subjects of these bills: "support of the poor;" "preventing infection of the horned cattle," "preservation of deer," and "preventing frauds by the dealers in flour, beef, pork, tar, pitch and turpentine;" from a House of Delegates October 31, 1785, printed list of them. *Madison Papers*, 8:394-395.

mean different things to those of differing political views.

In summary, some or all of the reasons discussed above probably explain Jefferson's seeming inconsistency in his simultaneous support of both his religious freedom statute and the Sunday closing law at the time of their eighteenth century Virginia adoption.

Chapter 6: SUNDAY CLOSING LAWS IN THE NINETEENTH CENTURY.

The national dynamic concerning Sunday closing laws in the nineteenth century was crisply summarized by law professor Andrew J. King:

During the nineteenth century American courts reluctantly gave up strict enforcement of Sunday observance. The American theories of religious liberty—separation of church and state and noncoercion—made it increasingly difficult for courts to give Sunday restrictions a sectarian justification. To avoid state constitutional questions, the courts adopted a police power justification that relied on the theme of Sunday as a “day of rest.”¹

To apply the trends summarized above to Virginia’s nineteenth century Sunday closing laws, national developments are here considered with relevance to the Virginia experience. The principles derived are applied to Virginia closing-law situations.

(a) Sunday Closing Law’s Nineteenth Century Impact on Liability Arising from Sunday Contracts or Negligence.

(1) Representative State Courts Outside Virginia Denying Liability Due to Sunday Closing Law.

Nineteenth century non-Virginia appellate cases with Virginia relevance concerned Sunday closing law applications to [a] contracts made or performed on Sunday; or [b] negligence injuring claimants on Sunday. In *McGrath v. Merwin*, the Massachusetts closing law prohibited “any manner of [Sunday] labor, business or work, except . . . necessity or charity.” The plaintiff McGrath, injured by defendants’ “carelessness,” worked for them on Sunday (termed the “Lord’s day” by the court) because “it was more convenient and profitable” for

¹ Andrew J. King, “Sunday Law in the Nineteenth Century,” *Albany L. Rev.* 64 (1990):675, 771-772. When the article was published, its author was an associate professor of law at the University of Maryland School of Law, *ibid*, 675.

the defendants that he do so than “any secular day.” The court held the plaintiff’s “illegal” Sunday work repairing paper mill machinery “was inseparably connected with the cause of action and contributed to his injury,” denying recovery solely for that reason.²

McGrath was relied upon by the defendant in *Bucher v. Cheshire R.R.* before the United States Supreme Court, an appeal from a Massachusetts federal trial court, which denied Bucher’s injury claim against the defendant railroad, although the latter’s negligence caused the injury. This denial was because, the lower court held, (1) plaintiff Bucher’s Sunday travel violated the state closing law; and (2) the travel was not a “necessity,” thus not exempted from closing law prosecution.

The Supreme Court affirmed, due to the popularly-termed federal “Rules of Decision” Act,³ requiring substantive state law to control in this federal trial. The Court determined (1) the applicable Massachusetts law, and (2) that it was required by the “Rules of Decision” Act to apply that law in *Bucher*, even though it preferred not to do so:

[T]he Supreme Court of Massachusetts. . . holding[s] that a person engaged in travel on the Sabbath day, contrary to the statute of the State, . . . shall not

² *McGrath v. Merwin*, 112 Mass. 467, 468-469 (1873).

³ *Bucher v. Cheshire R.R.*, 125 U.S. 555, 582 (1884). The “Rules of Decision Act” (see s.v. “Rules of Decision Act” *Black’s Law Dictionary* [7th ed]), currently 28 U.S.C. § 1652, originally §34 of the Federal Judiciary Act of September 24, 1789, c.20, 1 Stat. 73, provided “the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require . . . , shall be regarded as rules of decision in trials at common law in the Courts of the United States,” Its current text is the same except “civil actions” replaced “trials at common law” to conform to “terminology of the Federal Rules of Civil Procedure.” See *Historical Note* in “Official” (2000) edition, United States Code, following 28 U.S.C. § 1652 (Washington: U.S. Gov’t Printing Office, 2000).

recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish . . . a local law . . . of sufficiently long standing to establish the rule, . . . though giving an effect to it which may not meet the approval of this court⁴

Thus, in *Bucher*, the Court found itself constrained by federal statute to follow Massachusetts closing law rules denying the plaintiff recovery, despite its disapproval of those rules.

Other nineteenth century American courts, mostly in New England, applied Sunday closing laws similarly to Massachusetts. In Maine's *Parker v. Latner*, the defendant leased a horse and carriage on a Sunday, allegedly damaged due to his negligent driving. The plaintiff lost solely because the contract was made, and the alleged negligence occurred, on a Sunday, rendering the contract illegal under Maine's Sunday closing law:

If the contract had been a valid contract, the defendant would have been liable upon the implied promise to use ordinary and common care of the property bailed, which the case finds he did not. Being a contract illegal and void, his liability upon the contract is at an end.⁵

Similarly, in Rhode Island, a defendant leased a horse and buggy on Sunday from the plaintiff, but did not return them at the place promised, resulting in alleged damages. Because the contract was made on Sunday, however, the plaintiff was denied relief:

That agreement, . . . violat[es] . . . a statute which prohibits the plaintiff from so contracting on Sunday. . . . [T]he contract was thereby rendered illegal. . . . [N]o court will lend its aid to a man who founds his cause . . . upon an . . . illegal act. . . ; and though the objection, said Lord Mans-

⁴ *Bucher*, 125 U.S. at 584. *McGrath* (see n. 2, this **Chapter**, *supra*, and accompanying text) was cited by defendant railroad in *Bucher*, *ibid* at 576, as reflecting Massachusetts law.

⁵ *Parker v. Latner*, 60 Maine 528, 531 (1872).

field, . . . sound [sic] ill in the mouth of the defendant, it is allowed, not for . . . sake of the defendant, but because the court will not lend its aid to such a plaintiff.⁶

In accord, Vermont held that a traveler without a “necessity” or “charity” exemption for Sunday travel could not recover from a negligent defendant who injured him that day.⁷

Andrew King concluded that application of closing laws to deny recovery to injured travelers or workers largely ceased by the end of the nineteenth century.⁸ Vestiges, however, remained. In Mississippi, as late as 1925 for example, a plaintiff’s recovery for damages due to drinking the defendant bottler’s contaminated beverage was reversed because plaintiff bought and consumed the drink on Sunday, violating, the court held, the closing law:

Before the manufacturer . . . was liable . . . for a breach of its warranty of . . . fitness . . . , the party injured thereby must have . . . rightful possession of the drink. The implied warranty runs with the sale and passes with the title, and where the sale . . . is made void by [the Sunday closing law] statute, and where he is a participant in the sale, he cannot recover, although this statute makes the crime, apparently, apply to the seller alone. His [plaintiff’s] . . . purchase is illegal . . . and the courts will not give him relief for injuries . . . brought about by . . . an illegal act in which he is a joint participant voluntarily.⁹

⁶ Whelden v. Chappel, 8 R.I. 230, 233 (1865). Lord Mansfield was the “greatest judge” of eighteenth century England; Richard A. Smith s.v. “Mansfield, William Murray . . .” *Oxford Companion to British History*, John Cannon, ed. (Oxford: Oxford Univ. Press 1997), 616.

⁷ Johnson v. Town of Irasburgh, 42 Vt. 23 (1874). (If plaintiff’s Sunday travel to preserve fish was “necessary”? held: jury fact-question, not subject to appellate review.)

⁸ See n. 1, this **Chapter**, and accompanying text, *supra*. (Nineteenth and twentieth century Virginia closing laws did not bar Sunday travel, only certain Sunday labor.)

⁹ Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97, 98-99 (1925).

The above-quoted majority opinion generated a biting dissent:

The [majority] rule . . . means that an innocent person, who purchases a bottled drink on Sunday . . . poisoned . . . with filthy flies . . . caus[ing] him great . . . suffering[,] . . . has no remedy The purchase and drinking . . . on Sunday is merely incidental to the breach of the warranty by the manufacturer, . . . on a previous day when he bottled the poisoned drink The . . . majority opinion will . . . free . . . every vendor of drinks . . . sold on Sunday [from liability], regardless of the . . . damage.¹⁰

This dissent well-summarized views of other courts increasingly rejecting older common law barring claimants from recovery due to negligence or contract breaches, solely because plaintiffs were, at the time of their injury, violating Sunday closing laws.

(2) Representative State Courts Outside Virginia Retreating from Denying Liability Due to Sunday Closing Laws.

Other late-nineteenth century cases rejected closing laws as a reason to escape from liability due to Sunday negligence. An example was *Carroll v. Staten Island R.R.*,¹¹ which found a plaintiff passenger's Sunday injury was caused by the railroad's negligently maintaining a ferryboat boiler. The resulting explosion injured the passenger. *Carroll* indignantly denied New York's closing law could free the defendant from liability:

It is certainly a startling proposition, that the thousands . . . who travel . . . on Sunday, . . . are at the mercy of . . . careless engineers . . . , for . . . their negligence The plaintiff's unlawful act [i.e., Sunday travel] did not . . . contribute to the explosion. . . . To hold the carrier exempt from liability, because the plaintiff was violating the Sunday statute, would . . . shield a

¹⁰ Holden, J, *dissenting*, in *Grapico Bottling*, *ibid*, 106 So. at 99; joined by Cook, J.

¹¹ *Carroll v. Staten Island R.R.*, 58 N.Y. 126 (1874).

wrongdoer from a just responsibility for his wrongful act.¹²

Carroll thus rejected earlier Sunday closing law cases supposedly promoting Sunday rest through discouraging Sabbath travel and work. These cases led, however, to reprieving defendants from their own wanton negligence for no reason except that the harm occurred on Sunday. The persuasiveness of *Carroll's* view caused other states to follow it in denying that closing laws should preclude recovery for Sunday injuries.¹³

Implicit in these decisions was technology's social impact as the nineteenth century progressed, undoing simpler generalizations of earlier ages facing fewer complications due to ceasing secular activities on Sunday. An earlier-nineteenth century discussion of the Sunday closing-law problem actually couched in such terms was an 1829 Report by Kentucky Senator Richard M. Johnson, chair of the United States Senate Committee on Post Offices and Postal Roads. After hearings on demands by some religious groups that the federal government, as a "Christian nation" suspend Sunday transport of mails,¹⁴ the Senator

¹² Ibid at 135-136 (Vainly cited by plaintiff in *Bucher*, nn. 3-4, this Chapter, supra, and supporting text; [125 U.S. at 569-570]).

¹³ *Carroll* followed, for example, in *Opsahl v. Judd*, 30 Minn. 126, 14 N.W. 575, 576 (1883) ("[Deceased's] presence [on Sunday] did not . . . cause the accident; and . . . wrongdoers [due to Sunday travel,] though answerable to the state[,] . . . are entitled to the protection [from] . . . negligence of others."; and in *Van Auken v. Chicago & Western Mich. R.R.*, 69 Mich. 307, 55 N.W. 971, 974 (1893) ("In nearly all the states it has been held under quite similar [Sunday closing] statutes that a party traveling . . . who is injured . . . , is not barred from recovery . . . [because] the injury occurred on Sunday."))

¹⁴ Senator Johnson commented on these demands: "The transportation of the mail on the first day of the week [i.e., Sunday], . . . does not interfere with the rights of
(continued...)

disagreed:

The various departments of government require, frequently in peace, always in war, the speediest intercourse with the remotest parts of the country; and one important object of the mail establishment is to furnish the greatest and most economical facilities for such intercourse. The delay of the mails one whole day in seven would require the employment of special expresses, at great expense, and sometimes with great uncertainty.

The commercial, manufacturing, and agricultural interests of our country are so intimately connected as to require a constant and the most expeditious correspondence between all our seaports, and between them and the most interior settlements.¹⁵

After thus describing difficulties expected from ending Sunday mail transport, Senator Johnson concluded that continuing Sunday mail best honored the Constitution, despite religious objections.¹⁶ His report influenced the 1858 California Supreme Court in *Ex parte*

¹⁴(...continued)

conscience. The petitioners for its discontinuance appear to be actuated from a religious zeal, which may be commendable if confined to its proper sphere; but they assume a position better suited to an ecclesiastical than to a civil institution." Senator Richard M. Johnson, Chair, Committee on Post Offices and Post Roads, Report [on Sunday Observance and Delivery of Mail], January 19, 1829, 20th Congress, 2d Session, Senate Report No.74, *The Debates and Proceedings in the Congress of the United States with an Appendix Containing Important State Papers and Public Documents and All the Laws of a Public Nature; . . . Index*, 42 vols. (Washington, D.C.: 1834-1856); Reprinted in *Annals of America*, Mortimer J. Adler, ed. (Chicago: Encyclopedia Britannica, 1976), 5:284, 285. (Hereinafter, "Johnson, *Annals*")

¹⁵ Johnson, *Annals*, *ibid*, 286-287.

¹⁶ "What other nations call religious toleration, we call religious rights. . . . Let the national legislature once perform an act which involves the decision of a religious controversy and it will have passed its legitimate bounds. . . . Our Constitution recognizes no other power than that of persuasion for enforcing religious observances." *Ibid*, 287.

Newman,¹⁷ to declare unconstitutional its state Sunday closing law; a position from which it subsequently retreated.¹⁸ Nevertheless, practicality, as shown in Johnson's Report,¹⁹ rather than constitutionality, seemed more influential in the Sunday closing laws' demise.²⁰

(b) **An Unsuccessful Attempt to Escape Sunday Liability Through the Virginia Sunday Closing Law.**

Many of the principles already discussed in this **Chapter 6** became relevant in Virginia due to the United States Supreme Court's applying them in *Powhatan Steamboat Co. v.*

¹⁷ Ex Parte Newman, 9 Cal. 502, 506, 507 (1858), referring to "Mr. Johnson," and his "celebrated Sunday-mail report," correctly quoted, but without further citation details.

¹⁸ Ex parte Andrews, 18 Cal. 679, 684 (1861) ("The Act . . . requires no man to profess or support any . . . religious faith, or even to have any religion at all. It simply requires him to refrain from keeping open his place of business on Sunday.") (Adopting dissent of Justice Field in *Newman*, n. 17, *ibid.*, as part of the *Andrews* opinion.)

¹⁹ See quotation in text preceding n. 15, this **Chapter**, *supra*.

²⁰ The ubiquitous Tocqueville, in 1831, shortly after Senator Johnson's 1829 report, *ibid.*, colorfully described the totality of a Sunday-law closedown in an urban setting:

There is, notably, a great American town in which, from Saturday evening on, social movement is almost suspended. You go through it at the hour that seems to invite the mature to business and youth to pleasures, and you find yourself in profound solitude. . . . One hears neither the movement of industry nor the accents of joy, not even the confused murmur that continually rises from within a great city.

Alexis de Tocqueville, *Democracy in America* (Chicago: Univ. of Chicago Press, translated and edited by Harvey C. Mansfield & Delba Winthrop, 2000), 683 (Notes to Vol I., Part I, p. 39). Tocqueville was describing New York City, based on his June 29, 1831, letter written just after his five week stay there, as set forth in George Wilson Pierson, *Tocqueville in America* (New York: Oxford, 1938; Reprint, Baltimore: Johns Hopkins U. Press, 1996 [paperback]), 153-154, whose text substantially paralleled the above-quoted *Democracy in America* passage. Tocqueville claimed in the letter that "public opinion, much stronger than the law," *ibid.*, enforced the Sunday absence of activity.

*Appomattox R.R.*²¹ in analyzing the Virginia closing law's impact on the defendant railroad's liability for Sunday negligence and contract breach. The steamboat company sought damages for goods its ship carried from Baltimore, Maryland, to City Point, Virginia.²² Reaching City Point on Sunday, its crew unloaded the goods into the defendant railroad's wharfside warehouse, with the defendant merely unlocking and relocking the warehouse door before and after delivery. The railroad ran no Sunday trains and planned to reload the goods on its Monday Petersburg (Virginia) freight.²³ On the same Sunday the goods reached the warehouse, however, a fire there destroyed them due to, the trial court found, the defendant's negligence. This was a finding not challenged on appeal.²⁴

Virginia's Sunday closing law was essentially unchanged in 1853²⁵ from its original enactment.²⁶ Amendments exempted from prosecution (a) Sunday transport of "mail, or passengers and their baggage," (b) anyone "who conscientiously believes the seventh day of

²¹ *Powhatan Steamboat Co. v. Appomattox R.R.*, 65 U.S. [24 How.] 247 (1860).

²² City Point was "on James River," *ibid* at 250, twenty miles south of Richmond, *West Point Atlas of American Wars, 1689-1900*, vol. I, Vincent Esposito, ed., (New York: Praeger, 1959; reprint: Henry Holt, 1995) (unpaginated), Map 43 (a), "... 31 May 1862 ... [,] Battle of Fair Oaks ...").

²³ Defendant stored the goods "at the risk of the plaintiffs," 65 U.S. at 251, *held*: not to excuse defendant's "subsequent negligence and carelessness," *ibid* at 256, in that loss.

²⁴ *Powhatan*, 65 U.S. at 250-251 & 256.

²⁵ The Court decided *Powhatan* in 1860, but the fire-loss of plaintiff's goods, litigated in the case, occurred on June 26, 1853. *Powhatan*, 65 U.S. at 251.

²⁶ See text preceding n. 20, **Chapter 5**, *supra*, for the statute's text.

the week [is the] . . . Sabbath [Saturday], and actually refrains” from labor that day,²⁷ and (c) passengers and baggage on Sunday mail-stages.²⁸ These added exemptions could well have been derived from the previously-discussed 1829 Post Office Committee Report objecting to suspending Sunday mail transport, which favored them.²⁹

The Supreme Court summarized the result of the federal trial court proceedings:

the jury were substantially told by the presiding justice . . . , that . . . if they found . . . the goods were delivered on a Sunday, under a contract between the parties, . . . and were destroyed by fire on th[at] day . . . their verdict should be for the defendants.³⁰

Thus, the lower court attempted to use Virginia’s Sunday closing law to generate a

²⁷ Va. Code, Ch. 196, § 17 (Patton & Robinson rev., 1849), quoted in *Powhatan* at 247 & 252. A Saturday worshiper, by the amendment’s literal text, was not excused from the Sunday ban on labor if not “conscientiously believ[ing]” in the Saturday sabbath, an obligation not similarly imposed on a Sunday worshiper.

²⁸ *Powhatan*, 65 U.S. at 252 (quoting statute).

²⁹ See nn. 14-16, and accompanying text, this **Chapter**, supra. See also Johnson, *Annals*, 286, n. 15, this **Chapter**, supra: “Passengers in the mail stages, if . . . not permitted to proceed on Sunday, will . . . spend that day . . . under circumstances not friendly to devotion, and at an expense which many [cannot] . . . encounter.” Ibid at 285-286: “[A] variety of sentiment exists . . . on . . . the Sabbath day; and our government is designed for the protection of one [sentiment] as much for another. The Jews, who in this country are . . . entitled to the same protection from the laws, derive their obligation to keep the Sabbath from the Fourth Commandment, and . . . pay religious homage to the seventh day of the week, which we call Saturday.” The Virginia amendment, as in Senator Johnson’s Report, describes Saturday as the “seventh day of the week,” *ibid*, rather than by name. This suggests Virginia’s legislators may have based the amendments previously discussed herein on the Report’s language.

³⁰ *Powhatan*, 65 U.S. at 251-252.

jury “instruction,” like the jury “instruction” in *Francisco*,³¹ effectively removing the decision from the jurors. This was because it was undisputed that the “goods were delivered” and “destroyed by fire” on Sunday. This trial ruling, if not reversed, effectively meant that the defendant railroad escaped liability as a matter of law, due to the Sunday closing law. Also, like *Francisco*, however, this reliance on the closing law did not survive the appeal. The United States Supreme Court reversed the lower Virginia federal trial court.³²

What *Powhatan* accomplished, without citing authority beyond the Virginia Sunday closing law itself,³³ is given context by legal scholar Norman Cantor:

The common law is sometimes hailed as a kind of fixed heavenly firmament, its . . . principles shining down like beautiful and remote stars, infinitely set apart from the anxieties . . . and passions of particular human lives. That is not what legal history teaches. On the contrary, contingency, relativity, malleability, institutional change in response to modification in context and ambiance—this is what the history of the common law teaches. . . .

Reading a case for historical purposes broadens the implications of the legal text and joins it with social, political, and cultural trends. This may not be what the lawyer always wants; it is what the historian always needs to explain judicial change or to use law cases for social history.³⁴

The analysis by *Powhatan* of the Virginia closing law exemplified the Court’s con-

³¹ See n. 10, **Chapter 2**, *supra*, and accompanying text.

³² *Powhatan* at 255-256.

³³ *Powhatan*’s lack of cited authority was not due to a lack of briefing. Instead, the Court observed: “The arguments upon both sides contained. . . cases . . . [concerning] . . . Sunday laws; but [since] . . . this case does not come within the scope of the Virginia code, the insertion of these arguments is not considered necessary.” 65 U.S. at 249.

³⁴ Norman F. Cantor, *Imagining the Law: Common Law and the Foundations of the American Legal System* (New York: HarperCollins, 1997), 375-376.

sideration of “institutional change in response to context and ambiance” as Cantor described. *Powhatan* delineated, without characterizing them as such, complexities that could arise due to Virginia’s closing law; analogous to the difficulties noted by the dissent in the 1925 Mississippi tainted soda-pop opinion.³⁵ For example, said *Powhatan*, if plaintiff steamboat company had sued for compensation for its Sunday “labor of landing and depositing the goods” at defendant railroad’s warehouse, or if defendant had refused “to open and close the warehouse” on Sunday, or if the defendant had refused on Sunday “to allow the goods to be deposited” at the warehouse, then the Sunday closing law “would apply,” to deny plaintiff recovery it might have asserted, under those assumed, but non-existent, facts.³⁶

Such Court-posed hypotheticals seemed calculated to illustrate to the business community, through this opinion in the Court’s much-read *Reports*,³⁷ how commerce could be impeded by Virginia’s Sunday closing law. This surmise is strengthened by the Court’s first

³⁵ See nn. 9 and 10, *supra*, this **Chapter**, and supporting text.

³⁶ *Powhatan*, 65 U.S. at 255-256.

³⁷ Roy M. Mersky, s.v. “Publishing Law,” *Oxford Companion to American Law*, Kermit L. Hall, chief ed. (New York: Oxford Univ. Press, 2002), 679-681: “The reporting of decisions of the Supreme Court deserves special mention Because of the importance of these decisions, the Court’s holdings were reported almost from the beginning. . . . The Supreme Court endorsed the principle [in *Wheaton v. Peters*, 33 U.S. 591 (1834), says Mersky] that no copyright should exist in the laws governing the nation [such as its own opinions], since their wide dissemination is [sic] essential,” 680, *ibid* (Note: The Justices in *Wheaton* were “unanimously of opinion that no reporter has nor can have any copyright in the written opinions [of] . . . this court. . . ,” *ibid*. at 668. That the Justices did so because wide dissemination of their opinions was “essential,” was Professor’s Mersky’s inference; no doubt well-merited, but not expressly stated in *Wheaton*.)

offering, as just described, a variety of hypothetical circumstances where the Virginia Sunday closing law would apply to deny plaintiff relief for commercial losses. The Court then, miraculously—or so it might seem—extracted from the case other facts mandating that the Sunday closing law should not apply in *Powhatan*. This meant plaintiff steamboat company could recover, according to the Supreme Court, thus reversing the trial court.

The legal-reasoning mechanism *Powhatan* applied to deny the closing law's application was one of several typically used by common-law courts construing statutes not to their liking, which they cannot, or prefer not, to overrule. "[I]nstitutional change in response to modification in context and ambiance," as Norman Cantor described,³⁸ is implemented by such courts "discovering," as it were, a previously unarticulated underlying principle which they assert is, nevertheless, applicable. "Obviously," or words to that effect (according to such a court), the principle is one the legislature could not have intended to be impaired by the statute it drafted. *Powhatan* accomplished this by declaring that the issue before it

was one to which the Sunday laws of Virginia have no application whatever. . . . [T]he *real* claim is grounded on the obligations . . . imposed on the defendants safely and securely to keep, convey, and deliver the goods, and upon their subsequent negligence . . . , whereby the goods were lost.³⁹

Powhatan thus asserted there were underlying "obligations . . . imposed on the defendants safely and securely to keep . . . the goods," independent of any contract with plaintiff steamboat company. These obligations, the Court reasoned, could not cease on Sunday, any more

³⁸ See n. 34, this **Chapter**, *supra*, and supporting text.

³⁹ *Powhatan*, 65 U.S. at 253, 255-256 (emphasis added).

than a bank was relieved on Sunday from protecting depositors' funds in its vaults. The logic here was similar to the later holding in *Carroll*.⁴⁰ The *Powhatan* Court declared that if it had ruled that defendant railroad's gaining Sunday possession of the goods, excused defendant's later negligence in destroying them due to the Sunday fire, this would

amount to a forfeiture of the goods, . . . allow[ing] the carrier . . . voluntarily to destroy . . . or to appropriate them to his own use. [¶] [T]he obligations of the defendants, . . . were not varied [because] . . . the goods were deposited in their warehouse by their consent on 'a Sabbath day.' Great injustice would result from any different rule, and although the precise question has seldom or never been presented for decision, yet we think the analogies of the law fully sustain the rule here laid down. For these reasons . . . the instruction given to the jury was erroneous.⁴¹

Powhatan expressly generated new, judge-made law, by applying "analogies" (as stated in the above quotation), rather than relying on precedent. However, it was not content to let its ruling rest exclusively on the defendant's duty to protect bailed goods, independent of the closing law. It also asserted a statutory "necessity" for labor on Sunday (stretching

⁴⁰ See n. 12, this **Chapter**, *supra*, and supporting text quoting *Carroll*. *Powhatan's* technique of asserting an underlying principle of safekeeping people and property, to negate the Sunday closing law's seeming imperative of not working or traveling on that day, was also applied in *Carroll*, 58 N.Y. 126, 133-134, 137: "The graveman of the action is, the breach of the duty imposed by law upon the carrier . . . to carry safely . . . persons . . . exist[ing] independently of contract, The plaintiff went upon [defendant's steamer] . . . in . . . an unlawful purpose, [i.e., Sunday travel] [but since] [t]he action was not founded upon contract; . . . the principle that courts will not . . . to enforce the performance of illegal contracts has no application. . . . [T]hat the plaintiff was. . . traveling contrary to the [Sunday closing] statute, is no defense . . ." (Emphasis added.)

⁴¹ *Powhatan*, 65 U.S. at 257 (emphasis added). Virginia overturned *Powhatan* within its borders by statute, 1889-90 Acts of General Assembly, c. 49 ("[N]o steamboat company shall . . . load or unload on a Sunday any steamship . . . at any port or landings . . . of this state. . . .") (Adopted February 7, 1890).

back to the earlier-discussed edict of Emperor Constantine)⁴² by alternatively holding:

To take care of the goods on “a Sabbath day,” and safely and securely keep them, after the goods were received, was a work of necessity, and therefore was not unlawful, even on the theory assumed by the defendants [i.e., reliance on the Sunday closing law and its “necessity” exception], and the defendants were not expected to convey or deliver the goods until the following day.⁴³

Powhatan thus limited Virginia’s Sunday closing laws by first denying they applied to so-called “noncontractual” duties of protecting goods or passengers. Second, it afforded more scope to the courts to define a given Sunday activity as a “necessity,” exempted by the closing law from prosecution. These themes reappear in Virginia decisions to dilute closing-law effectiveness.⁴⁴

⁴² Emperor Constantine’s edict discussed at nn. 19-23, **Chapter 3**, and accompanying text, *supra*.

⁴³ *Powhatan*, 65 U.S. at 256.

⁴⁴ Contra to the trend suggested here was *Norfolk & Western R.R. v. Commonwealth*, 93 Va. 749, 24 S.E. 837 (1896), holding a Virginia statute denying the right to “load, unload, run or transport . . . on a Sunday, any car, train . . . or locomotive,” did not violate U.S. Const. art. I, § 8, cl. 3, (interstate commerce clause), since the coal cars in question, being empty, lacked “commerce” to regulate. *Ibid.* at 753. It alternately held: (1) this legislation might “affect” commerce, but not unconstitutionally “regulate” it, when intended to protect “health and morals” by shielding “persons from the physical and moral debasement . . . from uninterrupted labor,” *ibid.*, at 757, 762, 763; and (2) the lack of necessity for Sunday coal-car travel: “[The statute’s] only effect upon such commerce would be to delay it a few hours There is nothing in . . . coal . . . that requires that the laws . . . for the preservation of the health and morals . . . should be struck down . . . [for] a more rapid movement.” *Ibid.* at 763. The court’s acceptance of delay for “only . . . a few hours,” *ibid.*, . . . recalls Justice Holmes’ wry comment that “property rights may be taken . . . without pay if you do not take too much.” *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J, dissenting).

Chapter 7: VIRGINIA'S CLOSING LAW ENTERS THE TWENTIETH CENTURY.¹

(a) Closing Law Appeals Through the Conclusion of the First World War.

Virginia's twentieth-century Sunday closing law appellate litigation began with *Hortenstein v. Virginia Carolina R.R.*² The plaintiff, executor of an estate of a decedent fatally injured by the defendant railroad, urged the mirror-image opposite of railroads in other states who, as earlier discussed,³ urged they should not be liable when those they injured were traveling or working contrary to a closing law. The plaintiff here insisted that the defendant railroad was liable to his deceased's estate for the same reason: illegal operation on a Sunday of the locomotive injuring deceased. Had it not been so operating contrary to the Sunday closing law, the executor argued, the deceased could not have been fatally injured.

Virginia's high court was unimpressed. It found plaintiff failed to show the railroad "did not come within the exceptions contained in the [Sunday] statute."⁴ Second, it held that merely alleging the railroad violated the Sunday law was insufficient. To prevail, "the

¹ In this thesis, not every Virginia Sunday closing law appellate decision has been cited but it is believed, in good faith, that all major trends are covered.

² 102 Va. 914, 47 S.E. 996 (1904). Although this appeal was decided in 1904, the events litigated occurred in 1901, *ibid* at 915.

³ See nn.2 through 4 and accompanying text, **Chapter 6**, *supra*.

⁴ *Ibid*. Those exceptions allowed Sunday operations to transport "live stock, . . . articles of such perishable nature as would be necessarily impaired in value by one day's delay," and "ordinary goods . . . "to make a whole train-load." Va. Code, § 3801.

same facts . . . [as] if the . . . negligence” had not occurred on Sunday must be proved.⁵

Procedural nuances of a sort irritating to nearly everyone except lawyers dominated Virginia’s next twentieth-century Sunday closing law appeal, *Wells v. Commonwealth*.⁶ The defendant argued he could not be fined for closing law violations, due to a 1904 closing-law amendment providing in part: “From any judgment rendered under this section, the right of appeal shall lie . . . as appeals in misdemeanor cases.”⁷

The Virginia Supreme Court agreed, reversing defendant’s conviction, first, because the closing law did not describe itself as a misdemeanor. Second, the court found that the 1904 amendment’s requiring closing law appeals to proceed like misdemeanor appeals “indicates a conscious knowledge . . . of the legislature that the accused already has a right of appeal” for misdemeanors. Therefore, the court held, the Sunday closing law was not a criminal statute, so criminal law provisions for collecting fines did not apply. The State could collect forfeitures at bar, the court held, only through a separate civil suit.⁸

⁵ *Hortenstein*, 102 Va. at 924, 926.

⁶ 107 Va. 834, 57 S.E. 588 (1907).

⁷ Va. Code Ann., §3799 (1887). Amendment in 1904 Acts of Assembly at 79. The statute’s legislative history was traced in 107 Va. at 841 (Buchanan, J., dissenting).

⁸ 107 Va. at 835-836, 838. Parsing the amendment’s language, *Wells* found its reference to an appeal from any “judgment,” not any “conviction,” also suggested a civil rather than criminal proceeding, *id.* Two judges dissented, swayed by the closing law’s placement in the misdemeanor portion of the state code; and dictum calling it a misdemeanor, *ibid* at 840-842. See further discussion in n. 15, this Chapter, and accompanying text, *infra*.

Following *Wells*,⁹ *Hanger v. Commonwealth*¹⁰ affirmed a trial-court termination of what the appellate court saw as a blatant closing law evasion, commencing shortly after the City of Portsmouth threatened to prosecute Hanger for his drugstore's closing law violations. In response, Hanger incorporated the "Crawford Social Club" where, its charter declared, "... questions of the day may be discussed . . . and furnishing [occurs], at . . . all times, to its members, for pay, . . . [of] refreshments . . . and . . . other articles" As Club president, Hanger arranged its "meetings" in his drugstore's back room. The Club "rented" the room from the drugstore for ninety percent of the Club's receipts from sales to Club members of drugstore merchandise.

The Club opened Friday, May 11, 1906. Club "members" paid no dues but, instead, signed applications for immediate admission as Club customers of the drugstore. Club sales were in full swing at the drugstore, which members reached through the Club's "rented" back-room, on May 13, the second Sunday after Hanger was warned of future closing law prosecutions.¹¹ He was convicted of violating that law by operating his Club. The supreme court reversed his conviction, however, holding its recent *Wells* decision barred criminal prosecution for closing-law violations. It then awarded the City a seeming consolation prize by affirming the trial court's voiding of the Club's charter because

⁹ Footnotes 6-8, this **Chapter**, and accompanying text, *supra*.

¹⁰ 107 Va. 872, 60 S.E. 67 (1908).

¹¹ *Hanger*, 107 Va. at 876-878.

the charter . . . and the pretended organization of a *social club* thereunder was for the fraudulent purpose of . . . selling tobacco, cigars, cigarettes, soda-water, and other soft drinks on Sunday—a privilege which an individual could not exercise without incurring the forfeiture prescribed in [the closing law].¹²

Hanger voided the charter, holding the social-club incorporation “clearly never intended to confer upon the organization authority to conduct a business which, if conducted by an individual, would be in violation of the law.”¹³ By so ruling, however, the *Hanger* court avoided the uncomfortable issue of its own role in producing a result it now saw as unfavorable. After all, it was the court’s then-recent *Wells* decision, barring criminal fines for Sunday closing law violators,¹⁴ not *Hanger*’s incorporating his drugstore, that barred his criminal prosecution. The state supreme court arguably scapegoated the Social Club and its incorporation, when the real culprit the judges could more readily find by collectively looking in a mirror.¹⁵

¹² *Hanger*, 107 Va. at 878-879 (emphasis in original). The referenced *Wells* decision is discussed at nn. 6 - 8, this **Chapter**, and accompanying text, *supra*.

¹³ *Ibid* at 875.

¹⁴ See n. 8, this **Chapter**, and supporting text, *supra*.

¹⁵ *Wells*’s interpretation of the 1904 amendment governing closing law appeals (see n. 8, this **Chapter**, and accompanying text, *supra*) as applied in *Hanger*, was not compelling: (1) That the statute did not say it was a misdemeanor, the dissent noted, was not decisive, because “[m]any statutes whose violations are admittedly misdemeanors, do not in terms so declare.” *Ibid* at 841. (2) That the 1904 amendment allowed closing law appeals like “appeals in misdemeanor cases,” *ibid* at 836, the dissent said, merely provided an alternate appeal procedure; not a negation of the statute’s misdemeanor status. (3) Further, the closing law statute in *Wells*, 107 Va. at 835, described its violation as an “offence,” suggesting a criminal statute. See *Compact Edition of the Oxford English Dictionary: Complete Text* (continued...)

In both *Wells* and *Hanger*, the legislative modification of closing law appeal procedures led to confusion about what it meant and who it was intended to reach. *Hanger* also illustrated the incipient boldness of Virginia businesses in challenging that law, including bearing the expense of a supreme court appeal, in a case with all the earmarks of a test-case appeal.

In 1908, the legislature amended the closing law, providing a violator. "shall be guilty of a misdemeanor,"¹⁶ statutorily overturning just-discussed *Wells* and *Hanger*. The first appeal governed by this amendment, *Ellis v. Covington*,¹⁷ construed a municipal "ordinance . . . substantially in [amendment's] language," in considering whether the defendant could sell soft drinks, like Coca-Cola, on Sunday. The court held that defendant's municipal license for Sunday meal sales did not include Sunday soft drink sales, since the ordinance required separate licenses for each. *Ellis* then expressed a view whose significance would resurface, as will be seen, in *Francisco*: That the defendant "plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability under the

¹⁵(...continued)

Reproduced Micrographically (Oxford: Oxford Univ Press, 1971) ("*OED Micrograph*") 1:1978, defining "offence" [no. 7], in a criminal context ("breach of the law").(4) It thus seems *Wells* more nearly revealed high-court dissatisfactions with the closing law itself, rather than compelled by facts or precedent.

¹⁶ See legislative history in *Pirkey v. Commonwealth*, 134 Va. 713, 729, 114 S.E. 769 (1922). *Wells* and *Hanger* are discussed, *supra*, nn. 6 - 15, this **Chapter**, and accompanying text.

¹⁷ 122 Va. 821, 822-823, 94 SE 154 (1917), quoting Va. Acts 1916, c. 751.

[Sunday closing law] ordinance.”¹⁸ *Ellis* also quoted other provisions of that amendment which statutorily defined delivery of “ice cream manufactured on . . . other than the Sabbath,” as a “necessity,” exempt from prosecution.¹⁹ This reflected an accelerating trend of businesses obtaining legislative dispensation redefining their activities as closing-law “necessities,” exempt from prosecution.

(b) Virginia Closing Law Appeals After World War I Until July 1942.

Ellis was decided on November 18, 1917. World War I hostilities ended almost exactly one year later (less one week), on what came to be called Armistice Day, November 11, 1918. The war’s end saw significant changes in American mores, highlighted by social commentator Frederick Lewis Allen:

During the three or four years that followed . . . there came a subtle change People felt it was about time to relax; to look after themselves, [not] . . . the world in general; and to have a good time. . . . [A] contagion of delighted concern over things that were exciting but didn’t matter profoundly—was dominant. . . . [T]here was a very general desire . . . to shake off the restraints of puritanism, to upset the long-standing conventions of decorum.²⁰

The changes Allen described were mirrored in Virginia closing law appeals between the World War I Armistice through the pre-World War II nineteen-forties. Closing law concerns about work and labor earlier discussed shifted to cases dominated by that law’s appli-

¹⁸ *Ellis* at 825, discussed further, *infra*, nn. 109-113, **Chapter 8** and supporting text.

¹⁹ *Ellis* at 823.

²⁰ Frederick L. Allen, *The Big Change* (New York, Harper & Bros, 1952), 131-133.

cation in the context of “hav[ing] a good time,” through amusement or recreation, in the interwar period. The desire to “shake off . . . puritanism,” that Allen described, can be seen in these appeals, suggesting popular dissatisfaction with the Sunday closing-law which, as earlier discussed in the thesis was, as Allen put it, one of the “restraints of puritanism.”²¹

(1) *Religious Herald* Discussion of Rest on Sunday.

Some Virginians, immediately after World War I, wanted work to generally cease on Sunday for religious reasons, but hesitated about achieving this through secular law. In Richmond, the weekly *Religious Herald* newspaper, speaking for Virginia Baptists, through the paper’s editor Dr. D. H. Pitt, on December 16, 1920, urged the “necessity of adopting some guiding principles for [Sunday closing] legislation,” to prevent “great confusion,” through “unwonted activity of several Sabbath Observance Associations in favor of some sort of national legislation covering this question.” He further declared:

Wholly apart . . . from the Sabbath of the decalogue and the Lord’s Day of the New Testament, is . . . a legal day, a civil day, of rest. This . . . must be justified not by an ancient law given to the Jewish people, nor by the relaxation . . . of this law in the New Testament, but by the experience of mankind, showing . . . [it] is in the interest of society When we come . . . to the practical question of providing by law for such a day, it falls in with the convenience . . . of a great majority of our people to choose the first day of the week. . . . [W]e are not to legislate on the day as a religious institution at all. . . . [I]t is the duty of Christian[s] . . . to follow the . . . early Christian example of giving the first day of the week, . . . to worship [T]o carry out this purpose . . . they should refrain from . . . unnecessary labor. . . . As to the part which the State shall play[,] let it make no law concerning its civil rest day which interferes . . . with the . . . liberty of the soul in the religious

sphere.²²

Dr. Pitt's was not the only view about closing laws among those of Sabbatarian views. As his editorial noted, there were "several Sabbath Observance Associations" seeking "national legislation" enforcing Sunday closings. In the next weekly *Religious Herald*, however, he noted the daily *Richmond News-Leader*, "copies in full" his closing law editorial, and "in a pleasant editorial commends the tone and temper of that utterance." He further deplored "laxity in the observance" of Sunday as a "day of rest" among "Christian people" and "... inconsistent and unreasonable . . . legislation" arising without "guiding principles."²³

H. R. Pollard, of the Richmond City Attorney's office then weighed in with a letter the *Herald* published on January 6, 1921, commending Dr. Pitt for stating "clearly, . . . the

²² R. H. Pitt, Editorial, "The State and the Sabbath," *Religious Herald*, 10, 11 (Richmond, Va., December 16, 1920)(Emphasis added).

²³ Ibid, 10-11 (December 23, 1920). Such non-enforcement had been long noted. A speaker at the American Bar Association's 1880 annual meeting declared: "The laws for the observance of Sunday, though on the statute books . . . , have fallen into such disuse that they seldom come to the attention even of our profession, except when used as a shorthand way of getting rid of some nuisance on Sunday which is not otherwise prohibited; or when pleaded by some corporation as a defense to some action for neglect of duty." Quoted in Sr. Candida Lund, "The Sunday Closing Cases," *The Third Branch of Government: 8 Cases in Constitutional Politics, a Harcourt Casebook in Political Science*, C. Herman Pritchett and Alan F. Westin, ed. (New York: Harcourt, Brace & World, 1963), 277. Rigorous closing law enforcement appeared confined to communities organized for strict religious observance, such as Ocean Grove and Asbury Park, New Jersey, though even there, "after the turn of the [twentieth] century, [Christian] reform fervor [including for the Sunday closing law] was lost, but a comfortable family-oriented resort remained." Glenn Uminowicz, "Recreation in a Christian America: Ocean Grove and Asbury Park, New Jersey, 1869-1914," *Hard at Play: Leisure in America, 1840-1940*, Kathryn Grover, ed. (Amherst, Mass: Univ. of Massachusetts Press; and Rochester, N.Y.: The Strong Museum; 1992), 8, 35.

principles involved.” Pollard declared, like Dr. Pitt, that many Sunday closing law problems arose from a “misguided view that . . . political authority . . . might . . . enforce the Jewish Sabbath.” Sunday, the “Lord’s Day,” he said, and the Jewish “Sabbath Day,” were “not even as near . . . as first cousins.”²⁴ Pollard saw the legislating of Sunday observance as ignoring that this (quoting Jefferson) “destroys all religious liberty, because the civil magistrate will make his opinions the rule of judgment, and approve . . . the sentiments of others only as they shall square with . . . his own.” Pollard agreed with Dr. Pitt that government’s proper role was to stay out of the way, to not interfere with religious observances. He quoted the doctor’s editorial in concluding the state should “make no law concerning its civil rest day which interferes . . . with the freest and most unrestricted exercise of the liberty of the soul” in religion.²⁵

(2) *Pirkey Brothers v. Commonwealth: Cave Viewing on Sunday?*

No documentation discovered suggests the Virginia Supreme Court considered the views of H.R. Pollard of the Richmond City Attorney’s office, or Dr. Pitt, the *Religious Herald’s* editor, as discussed above. Remarkably, however, their views mirrored the ap-

²⁴ Pollard also noted: “If the strictures of the Sabbath day law (Mosaic law) is to be observed, a large majority of the Christian people could not attend Christian worship on the ‘Lord’s Day’ by reason of the inhibition against ‘making journeys’ on the Sabbath Day.” Ibid.

²⁵ H.R. Pollard, “Sound Doctrine,” *Religious Herald* (January 6, 1921), 5, variously quoted in this footnoted paragraph. Pollard quoted Jefferson’s “Bill for Establishing Religious Freedom,” as enacted in 1786. For full text, with legislative variants from Jefferson’s draft see *The Constitution and Religion: Leading Supreme Court Cases on Church and State*, Robert S. Alley, ed. (Amherst, N.Y.: Prometheus, 1999), 34, 35.

proach that court ultimately took in *Pirkey Bros. v. Commonwealth*,²⁶ more closely than any of the litigants' appellate briefs. *Pirkey's* congruence with Pitt's and Pollard's observations perhaps reflected increasing harmony of outlook by would-be Virginia opinion-makers.²⁷ *Pirkey* also revealed the court's increasing inclination to interpret closing laws in ways which, in practical terms, weakened their enforceability.

Defendant Pirkeys owned "Weyer's Cave, or Grottoes of the Shenandoah," a tourist attraction for which they charged admission. Heavy Sunday attendance led to church demands that it close that day. When the defendants refused, prosecution ensued. The jury convicted them, and the stipulated issue on appeal was "the simple question [of] whether the keeping open of these caverns and admission to them of visitors on Sunday, constitute a violation of the statute commonly known as the 'Sunday observance law.'"²⁸

Defendant cave-owners contended they did not "labor" on Sunday, as the statute

²⁶ 134 Va. 713, 114 S.E. 764 (1922). In 1919, a new state code designated the Sunday closing law as Va. Code Ann. §4570 (1919) at 2:1871, Code of Virginia (1919) (2 vols, ann.)(Richmond: David Bottom, Spt. of Public Printing, 1919)(Day of the week for closing amended from "Sabbath" to "Sunday"). Donald L. Dreisbach, at n. 20, **Chapter, 5**, *supra*, theorized that "Sabbath" in its eighteenth-century text reflected a more religious orientation than Jefferson's original "Sunday." However, the 1919 *Code* "Revisors' Notes" for the closing law, *Code* vol. 2 at 1871, stated "Sunday and Sabbath day are synonymous terms," *ibid*, citing out-of-state authority, which conflicts with Dreisbach's opinion.

²⁷ Reflected by, for example, Dr. Pitt's recounting the *Richmond News-Leader's* adoption of his editorial, as just-described at n. 23, this **Chapter**, *supra*, and accompanying text.

²⁸ 134 Va. at 715-716, from the trial court "certificate of facts" in Defendants' "Petition" for Appeal, *Pirkey Brothers v. Commonwealth of Virginia*, File No. 1616 [renumbered 6516](Richmond: Virginia Supreme Court [n. d.]), 7.

proscribed, but merely allowed Sunday entry to their caves for a fee (presumably dropped into an unattended lockbox, since they also claimed no Sunday employees).²⁹ Conceding no “absolute necessity for opening their caverns on Sunday,” they insisted doing so was, nevertheless, “reasonably . . . necessary” for wholesome, family diversion.³⁰

Pirkey’s reliance on this ground alone reduced the likelihood of appellate success. The daunting task in *Pirkey* was supplying grounds sufficiently compelling for a reviewing court to overturn that virtually sacrosanct creation of the common-law, a jury verdict.³¹ The defendants’ appeal, however, contested no jury instructions, asserted no constitutional nor closing-law infirmity, cited no legal authority nor legal error, except vaguely asserting it was “reasonably necessary” for defendants’ business to open on Sunday. Such minimal briefing

²⁹ *Pirkey Brothers v. Commonwealth*, “[Defendants’] Reply Brief,” File No. 6516 (Richmond: Virginia Supreme Court [no date]), 2: “The defendants permit [tourists] to enter the caverns upon payment of an admission fee. [The warrant does not charge they] . . . did any work [or] . . . employed any servants . . . on the Sabbath”

³⁰ Petition of Defendants [“plaintiff in error”] for Appeal, 2; *supra* n. 28, this Chapter.

³¹ *Chesapeake & Ohio RR v. Williams*, 108 Va. 689, 690, 62 S.E. 796 (1908) (“When a case has been fairly submitted to a jury, . . . it ought not to be interfered with by the court, unless . . . the verdict is clearly not warranted by the facts proved.”). *Hill v. Commonwealth*, 43 Va. (2 Gratt.) 595, 603 (1845) (“[W]here the jury and judge . . . concur in the weight . . . [of] the evidence, it is an abuse of the appellate power . . . to set aside a verdict . . . , because the judges of this court, from the evidence . . . , would not have concurred”) Accord, *Michie’s Jurisprudence of Virginia and West Virginia* (Charlottesville, Va: Michie, 1996), vol. 1B, “Appeal & Error” §267, 480, 482 (“Where the case has been fairly submitted to a jury, their verdict will not be disturbed . . . because the court . . . would have given a different verdict.”) (Pre-*Pirkey* cases cited).

usually merits scant appellate review.³² Thus, it was remarkable the reviewing court even considered the *Pirkey* appeal, given its poor preservation of appellate issues.

Assisting in the Commonwealth's briefing in *Pirkey* was "Leon M. Bazile, Second Assistant Attorney-General," later the trial judge in *Francisco*, with which this thesis began and to which it will return.³³ The issues he dealt with in *Pirkey*, as will be seen, anticipated questions he faced nineteen years later in *Francisco*.³⁴

The Commonwealth's brief first noted that appellants "failed to [cite] any authority in support of the contentions made," but did not urge rejecting the appeal on that ground.³⁵ Instead, consistent with the parties' stipulation,³⁶ it discussed decisions in other states, af-

³² This rule was first applied two years later in *Morris & Co. v. Alvis*, 138 Va. 149, 164-165, 121 S.E. 145 (1924), where appellant's "statement is made without . . . discussion, or citation of authority . . . [W]e have no disposition to enter the field . . . [when] counsel . . . offer no reason or authority in support of their statement."). Four of the five concurring judges in *Morris & Co.* decided *Pirkey*. Nothing indicates their 1924 views in *Morris & Co.* were different in 1922, when they decided *Pirkey*. The rule is currently stated in *Novak v. Commonwealth*, 20 Va.App. 373, 389, 457 S.E.2d 402, 410 (1995) ("Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration.")

³³ *Pirkey*, 134 Va. at 715. Prior discussion of *Francisco* and Judge Bazile is in **Chapter 2**, *supra*. Subsequent discussion of both occurs in **Chapter 8**, *infra*.

³⁴ See nn 93-95, and accompanying text, **Chapter 8**, *infra*.

³⁵ "Brief on Behalf of the Commonwealth," *Pirkey Brothers v. Commonwealth*, File No. 1616 [renumbered 6516] (Richmond: Virginia Supreme Court [n. d.]), 4. Appellate court rejection of an issue due to appellant's failure to cite authority, *per* n. 32, this **Chapter**, and accompanying text, *supra*, the Commonwealth presumably did not urge, because there was not, as of the *Pirkey* appeal, any Virginia appellate opinion expressly so holding.

³⁶ See n. 28, this **Chapter**, and accompanying text, *supra*.

firming convictions of Sunday theater operators under statutes resembling Virginia's, providing ground, the Commonwealth urged, to affirm the Pirkeys' convictions.³⁷

The parties thus briefed on appeal, as stipulated, "whether the keeping open of these caverns and admission to them of visitors on Sunday" violated Virginia's closing law.³⁸ The high court, however, had different view of the issue, revealed by its initial legal analysis:

The constitutional validity of the statute has not been called in question, and we do not doubt that it is a valid exercise of the police power of the State. Its provisions, however, cannot be enforced as a religious observance.³⁹

Thus the supreme court, though acknowledging the statute's constitutionality "had not been called into question," concentrated on that subject,⁴⁰ even though not briefed by the litigants, for the rest of its opinion (except less than a page in which it disposed of the appeal).

Pirkey's constitutional analysis then threaded the needle between recognizing the Christian religious preference of most Virginians while still acknowledging the force of Jefferson's religious freedom statute, by asserting that society must be "at all times according

³⁷ "Brief on Behalf of the Commonwealth," 4, n. 35, this **Chapter**, supra: "Under statutes similar to [Virginia's], the courts of other states have held that the sale . . . [of] tickets . . . to a show . . . on Sunday [violates] . . . statute[s] prohibiting laboring on Sunday [citing cases]."

³⁸ See n. 28, this **Chapter**, and accompanying text, supra.

³⁹ *Pirkey*, 134 Va. 713, 717 (emphasis added).

⁴⁰ If a reviewing court discerns an unexamined, determinative, constitutional issue on appeal, arguably it might pursue that issue. In *Pirkey*, however, this was not so, since the court conceded the statute *was* constitutional thus, presumably, not requiring analysis. For unarticulated reasons, however, it set forth its own constitutional interpretation in *Pirkey*.

freedom of conscience to all men.”⁴¹ It quoted *Perry v. Commonwealth*,⁴² asserting Jefferson’s statute purged the common law “of its [religiously] intolerant spirit;” by declaring (quoting the statute), that “all men shall be free to profess, and by argument maintain, their opinions in matters of religion; and the same shall in no wise affect, diminish, or enlarge their civil capacities.”⁴³

The religious-freedom statute further provided, *Pirkey* noted, that in Virginia, religious discussion “shall be as free as the air [citizens] breathe; that the law is of no sect in religion; has no high priest but justice.”⁴⁴ While thus acknowledging citizen entitlement to the “fullest freedom of conscience,” the court noted that the Virginia Constitution urged, specifically, “*Christian* forbearance,”⁴⁵ thus emphasizing the “Christian” context of the religious freedom espoused.

So *Pirkey*, metaphorically, carried water on both shoulders, by asserting “there was a fixed purpose to sever church and State, and to give the fullest freedom of conscience,” and also, in contrast, “that we are a Christian people, and the morality of the country is deeply

⁴¹ *Pirkey*, supra, at 717. Jefferson’s statute is cited in *Pirkey*, immediately following this quotation. Ibid. Note how this passage in *Pirkey* parallels the views of Dr. Pitt’s editorial in the *Religious Herald*, quoted in the text accompanying nn. 20-25, this **Chapter**, supra.

⁴² Discussed at n. 3, **Chapter 1**, supra.

⁴³ *Pirkey*, 134 Va. at 718, quoting *Perry*, 44 Va. at 611 (emphasis in both opinions).

⁴⁴ Jefferson’s statute, quoted in *Pirkey*, 134 Va. at 719.

⁴⁵ Ibid at 719 (emphasis by the Court). See Fr. Buckley’s comments, n.13, **Chapter 5**, supra.

engrafted upon Christianity.”⁴⁶

Pirkey extracted from Justice Brewer’s *Holy Trinity* Supreme Court decision,⁴⁷ events demonstrating, to its satisfaction, Virginia’s and the nation’s Christian underpinning, thereby justifying Sunday closing laws.⁴⁸ It declared that while the Sunday closing law “cannot be enforced as a religious observance, the great moral force that is back of it will make itself felt in its enforcement in conformity with the views of that force.”⁴⁹ Statutorily requiring public rest” on Sunday (i.e., abstention from ordinary labor), the court found, was constitutionally justifiable, when not coupled with a statutory obligation to worship.

Pirkey thus provided elaborate judicial support for the closing law, harmonized to existing religious preferences of Virginia’s public. This was a preface, however, for some metaphorical bombshells *Pirkey* then tossed, impairing future closing law prosecutions. Before reviewing these, however, attention is directed to *Pirkey*’s remarkable assertion that “We cannot, however, agree with the few courts that hold that the word ‘necessity’ must be

⁴⁶ 134 Va. at 720. The last quotation before the footnote was from from *People v. Ruggles*, 8 John. 290, 295, 5 Am. Dec. 335 (N.Y., 1811) (Kent, Chancellor). *Pirkey* also cited *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892), for its “Christian nation” dictum, previously discussed at nn. 29-35, **Chapter 5**, *supra*, and accompanying text.

⁴⁷ Discussed herein at nn. 26 - 36, **Chapter 5**, *supra*, and accompanying text.

⁴⁸ Including: (1) Virginia’s 1606 colonial charter, partly granted for “propagating of Christian religion;” (2) the 1776 revolutionary Virginia declaration of “Christian forbearance;” (3) testimonial oath “to the Almighty”; (4) opening “sessions of all deliberative bodies” with prayer; (5) Sunday closing of courts and government offices; and (6) many churches promulgating Christian doctrine. *Pirkey*, 134 Va. at 720-721.

⁴⁹ *Pirkey*, 134 Va. at 720-722.

construed to mean the same thing now as it did when the original act was passed in 1779.”

It explained this by asserting:

Many things that were deemed luxuries then [in the eighteenth century when the statute was adopted], or had no existence of all, are now deemed necessities. For example, street railways, telegraphs and telephones. The word is elastic and relative and must be construed with reference to the conditions under which we live, and yet the elasticity must not be extended so far as to cover that which is not needful but simply desirable, and thereby defeat the manifest purpose of the statute to set apart Sunday as a day of rest from ordinary labor.⁵⁰

Here the 1922 Virginia Supreme Court condoned in *Pirkey* what is today considered politically conservative legislation, prohibiting many forms of Sunday labor, being thereby supportive of a particular (Christian) religious belief. It nevertheless, surprisingly, took a position contrary to “original intent” analysis currently fashionable (circa 2005) among conservative constitutional interpreters, who typically assert

that in order to understand the Bill of Rights today, it is necessary to attempt to understand the original meaning of the amendments; to understand the Bill of Rights the way those who wrote the amendments understood them. . . .⁵¹

⁵⁰ *Pirkey*, 134 Va. at 722-723, also covering the short passages from *Pirkey* in the in the immediately preceding text paragraph. As explained at n. 20(1), **Chapter 5**, *supra*, Virginia enacted the closing law in 1786, not 1779 as quotation here footnoted states.

⁵¹ Eugene W. Hickock, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville: Univ. Press of Virginia, 1991), “Introduction,” 6 (emphasis added). Though discussing the “Bill of Rights” here, the analysis, by force of its own logic, applies to other writings, such as other constitutional provisions and statutes as well. Some commentators, such as James Madison, argued intent of those ratifying the text, not “those who wrote” it, *ibid.*, determined its “original” meaning. He stated: “[W]hatever veneration might be entertained for the . . . men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the
(continued...)

In contrast to such “original intent” analysis *Pirkey*, in a distinctly different approach, denied that “necessity’s” eighteenth century meaning, when the closing law was enacted, should continue to define its meaning thereafter. Instead, *Pirkey* posited that “necessity’s” meaning “changes, not only through time, but within different geographic locations in the jurisdiction at the same time.”⁵² This method of interpreting the meaning of “necessity” made the assessment of its contemporary definition much more difficult for prosecutors.

Pirkey limited this expansive interpretation of the closing law’s “necessity” exemption by cautioning against “defeat[ing] the manifest purpose of the statute to set apart Sunday as a day of rest from ordinary labor.” The General Assembly, however, arguably contributed to just such a “defeat,” in practical result, by amending the closing law to provide, as quoted in *Pirkey*: “This section shall not apply to furnaces, kilns, plants and other businesses of like

⁵¹(...continued)

Constitution. As the instrument came from them it was nothing more than a dead letter, until [ratified] . . . by the . . . people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond [its] face . . . , we must look . . . not in the General Convention . . . , but in the State Conventions, which . . . ratified [it]” James Madison, *Annals of Congress*, 4th Cong. 1st sess., V, April 6, 1796. Quoted in Leonard W. Levy, *Original Intent and the Framers’ Constitution* (New York, Macmillan, 1988), 14.

⁵² As *Pirkey* put it: “No fixed and unvarying definition of ‘necessity’ as used in the statute can be given. What may be a necessity in one place may not be in another. A Sunday excursion to the seaside . . . in the hot summer months may be a necessity for the crowded population in the tenement houses of a large city, when it would not be for the inhabitants of a small town. Every case must stand on its own peculiar facts and circumstances.” 134 Va. at 723.

kind that may be necessary to be conducted on Sunday.”⁵³ The businesses entitled to this new exemption (“furnaces, kilns, plants and other businesses of like kind”) though vaguely described, appeared to be larger manufacturers, employing larger numbers of workers.

This new exemption, more importantly, made it easier for these (apparently) larger businesses to escape the closing law: only that it “may be necessary” to do Sunday business was required. This contrasted with the old, actual “necessity” standard with no qualifying “may” about it, still applying to those (presumably smaller) businesses not granted this new exemption. Like the short-lived “ice cream” exemption,⁵⁴ this new exemption illustrated how some businesses gained special provisions excluding them from closing law prosecution, while others were still burdened with the older, more rigorous, standard.

Thus, *Pirkey* described or imposed measures having the practical effect of diluting the effectiveness of the Virginia Sunday closing laws, summarized as follows:

[1] The legislature effectively removed what today is termed “heavy industry” from the closing law prohibitions, quoted in the opinion.⁵⁵

[2] The “necessity” permitting labor on Sunday was not limited to that word’s eighteenth

⁵³ “[D]efeate[ing] the manifest purpose of the statute,” *Pirkey*, *ibid.*, at 723; “furnaces, kilns, plants and other businesses of like kind” amendment, *ibid.*, at 717.

⁵⁴ See n. 19, this **Chapter**, and accompanying text, *supra*.

⁵⁵ This was a legislative (statutory), not judicial, act. The closing law, however, was quoted in full in *Pirkey*, see n. 53, this **Chapter**, *supra*, and accompanying text, rendering it useful to include its newly amended features that effectively weakened the closing law here, where *Pirkey*’s similar impacts are discussed.

century meaning, nor to the same meaning throughout the state.

[3] The “necessity” exemption was broadened to be “not a physical and absolute necessity, but a moral fitness of the . . . labor done under the circumstances of each particular case.”⁵⁶

[4] “Issues of fact arising under the statute will . . . be decided by juries . . . reflect[ing] the community opinion of moral fitness and propriety.”⁵⁷ What constituted “moral fitness” sufficient to meet the closing law’s “necessity” exemption from prosecution, was also “generally a question of fact for the jury and not one of law for the court.”⁵⁸ This, *Pirkey* conceded, “leaves the question unsettled, with nothing for future guidance,” because “different juries may reach different results on the same evidence.”⁵⁹ Thus, a prosecutor’s determining whether given activity was a “necessity,” exempt from prosecution, was complicated by depending upon what the court frankly conceded would be, due to its holding: changing, and even contradictory, opinions of successive jury panels, not the more uniform results presumably obtainable from appellate precedent.⁶⁰

⁵⁶ *Pirkey*, 134 Va. at 723. The court listed ten states following this rule.

⁵⁷ *Pirkey*, 134 Va. at 722.

⁵⁸ 134 Va. at 726.

⁵⁹ *Ibid* at 726-727.

⁶⁰ *Pirkey* qualified the jury’s ability to decide the result by directing how the court should rule, in place of the jury, if there was either overly sufficient or insufficient evidence: “[I]f the labor is so clearly a work of necessity that no reasonable minds would differ . . . ; the court may treat it as a matter of law” as necessity, or “if the proof is so clear that no two
(continued...)

[5] Finally, the “work” or “labor” the closing law was intended to prohibit, *Pirkey* suggested, was only of those who could “‘be found’—indicating a public display [of work],” “laboring, —suggesting manual labor, rather than intellectual . . . employment; at ‘any trade or calling’— . . . seeming to exclude isolated transactions, and . . . pursuits higher than manual occupations”⁶¹ Thus, certain types of employment, including those characteristically performed by judges and lawyers [“pursuits higher than manual occupations”], were exempt from closing law prosecutions, *Pirkey* suggested. It would be a foolhardy prosecutor who ignored the unanimous “suggestions” of the judges in *Pirkey* on this point, that such activities were not covered by the closing law, despite the court’s further assertion that, being dicta, these “suggestions” were not controlling.⁶²

After this lengthy analysis, the *Pirkey* court disposed of the appeal in less than one paragraph of the seventeen-printed-page opinion, stating that the conviction of the Pirkeys:

is not [based on] . . . doubtful evidence, or conflicting testimony, but the verdict of a jury, . . . [R]easonably fair-minded men might draw different conclu-

⁶⁰(...continued)

reasonable minds could differ . . . that no possible element of necessity . . . entered into the . . . labor performed, then the court may, as a matter of law, treat the matter . . . not within the exception.” Ibid at 727, i.e., not exempt from closing law prosecution as a “necsssity.”

⁶¹ *Pirkey* at 728. Note that suggesting closing-law exemptions for “higher than manual occupations” arguably stigmatizes manual labor and, impliedly, those performing it.

⁶² After the statement here-quoted, the court then said: “But that question is not fore us, and we do not wish to be understood as expressing any opinion upon it.” Ibid. Of course, the court had “express[ed]” its “opinion,” whose force it now sought to deny. It would be difficult for a prosecutor to conclude the court meant other than what it had just said, and govern future prosecutions (or, more likely, non-prosecutions), accordingly.

sions as to the ultimate fact to be ascertained, to-wit, was the work done one of necessity in view of modern conditions of life. Under these circumstances we do not feel warranted in interfering with the verdict of the jury.⁶³

Virginia precedent compelling this result was previously discussed herein.⁶⁴ The *Pirkeys*, based on those precedents, failed to present to the reviewing court an arguably sustainable theory to support overturning the jury's decision. However, *Pirkey's* above-quoted assertion that it did "not feel warranted in interfering with the verdict of the jury" borders on the ironic. The supreme court, indeed, let the verdict stand, as compelled by Virginia precedent. The legal underpinnings for many future closing law prosecutions, however, were effectively shot asunder by *Pirkey's* five-part limitation on them, as just-discussed.⁶⁵

The supreme court did all this, as seen by the review of *Pirkey* appellate briefing, with no input from the litigants, supposedly a hallmark of the common law system.⁶⁶ This, presumably, was because their appellate stipulation assumed constitutionality would not be controverted, and therefore was not briefed. Accordingly, the litigants addressed none of

⁶³ *Pirkey* at 730-731. Note that the court, almost surreptitiously, here broadened the "necessity" exemption by adding it must be considered "in view of modern conditions of life," an expanded meaning certainly not self-evident from the closing law's text.

⁶⁴ See n. 31, *supra*, this **Chapter**, and accompanying text.

⁶⁵ See nn. 55-62, *supra*, this **Chapter**, and accompanying text.

⁶⁶ See appellate briefing, attached **Ex "C" & "D."** The court could have raised constitutional issues at oral argument. However, *Pirkey* states "the constitutional validity of the statute has not been called into question," 134 Va. at 717, suggesting that if the court did so, neither party challenged the constitutionality of the closing laws. This would be as expected, given the parties' stipulation. See n. 28, *supra*, this **Chapter**, and accompanying text.

court's conclusions on what it deemed the central issue in the case.

The court's methodology in its resolution of *Pirkey* uncannily resembles aspects of United States Supreme Court Chief Justice John Marshall's approach in his famous *Marbury v. Madison* opinion.⁶⁷ In *Marbury*, Marshall seemingly deferred to the executive branch of the federal government, but in such away as to reserve to his Court the important power of declaring acts of Congress unconstitutional. Both the Virginia high court in *Pirkey*, and the United States Supreme Court in *Marbury*, ruled, ostensibly, for the government. In *Pirkey*, this meant affirming a closing law conviction. In *Marbury*, it meant negating a minor judicial appointment of the outgoing Federalists (Marshall's own party).

Marshall's method of denying the appointment, however, was to rule that the statute Congress enacted to enforce it, unconstitutionally gave "original" (trial) jurisdiction to the Supreme Court. This, said Marshall, violated the Constitution's Article III which, he held, restricted the Supreme Court to appellate proceedings only (with minor exceptions not here applicable). Marshall, therefore, declared the statute unconstitutional, rendering it unenforceable to validate the *Marbury* judicial appointment.

Marshall's new analytical technique, it was quickly realized, could block other legislation as also supposedly "infirm." These new "infirmities" would be present, Marshall could contend, because this other legislation also was allegedly "inconsistent" in some way with the

⁶⁷ 5 U.S. (1 Cranch) 137 (1803). Text comments that follow consider *Marbury* not only as a judicial opinion, but also as crafted for a specific political result. *Pirkey* also appears to have had the political purpose of impeding closing-law prosecutions.

Constitution whose interpretation he had, by his adroit opinion, arrogated to his Federalist-controlled Supreme Court. Similarly, closing-law prosecution restrictions in the Virginia high-court's affirmance in *Pirkey* could not but impede future prosecutions under that law, given their common-sense consequences, as just described.⁶⁸ With the undoubted familiarity of the Virginia high-court judges with Virginia-native Chief Justice Marshall's landmark *Marbury* decision, the similarities in dispositional techniques of the two cases seem more than coincidence.

Through Marshall's opinions, commencing in *Marbury*, the United States Supreme Court—the last national bastion of the Federalist party—established itself as the final arbiter of the constitutionality of legislation proposed by the new Democratic-Republican Jefferson administration. In *Marbury*, that administration could not dispute his decision, since it was the prevailing party:

Because the opinion denied relief to William Marbury [the Federalist judicial minor-court appointee], there was no order to be enforced against the wishes of the executive branch of government. Hence the Jeffersonians were refused the opportunity to actively oppose the opinion At the same time, however, [the Marbury opinion] . . . thoroughly entrenched judicial review . . . and undermined Jeffersonian insistence upon legislative supremacy. *Marbury v. Madison* stands as one of the most artful utilizations of judicial power in the history of the Supreme Court.⁶⁹

⁶⁸ Those restrictions are discussed in the text supported by nn. 55-62, this **Chapter**, *supra*.

⁶⁹ Herbert Alan Johnson, "John Marshall," *The Justices of the United States Supreme Court 1789-1969: Their Lives and Opinions*, Leo Friedman & Fred L. Israel, ed. (New York: Chelsea House & RR. Bowker, 1969), 1:285, 292 (emphasis added).

Similarly, in *Pirkey*, the Virginia Supreme Court imposed limitations on future closing law prosecutions the Commonwealth could not challenge, because, like the Jeffersonians in *Marbury*, it prevailed on appeal. Thus, *Pirkey* and *Marbury* each allowed the respective government appearing before each to win the appeal, but in a way auguring ultimate loss by each government of the respective political war each was fighting.⁷⁰

(3) *Lakeside Inn Corp. v Commonwealth: Swimming on Sunday?*

On November 16, 1922, the day the Virginia Supreme Court decided *Pirkey Bros. v.*

⁷⁰ To counter denials that *Pirkey* intended to weaken closing law prosecutions, Abraham Lincoln's masterful *Cooper Union* response to those objecting to his similar assertion that [Dred] Scott v Sanford, 60 U.S. (19 How.) 393 (1857), was politically motivated through a conspiracy, is a persuasive answer:

But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen—[Senator] Stephan [Douglas], Franklin [Pierce] and James [Buchanan] and [Chief Justice] Rodger [Taney] for instance—and when we see these timbers joined together, and see they exactly [are] . . . adapted to their respective places . . . we find it impossible to not *believe* that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common *plan* or *draft* . . .

The Collected Works of Abraham Lincoln, Roy P. Basler, ed, 8 vols. (New Brunswick, N.J.: Rutgers Univ. Press, 1953), 2:465-66 (emphasis in original).

As will be seen, another case analyzed herein at nn. 71-87, this **Chapter**, and accompanying text, *infra*, (*Lakeside Inn, Corp. v. Commonwealth*) was published immediately after *Pirkey* on the same day, with *Pirkey's* rulings incorporated into it. The new closing law procedural restrictions in *Pirkey* were applied in *Lakeside*. Publishing these two cases on the same subject (closing laws) on the same day suggests judicial preplanning for a specific result, just as Lincoln described in his *Cooper Union* speech, *supra*, this footnote.

Commonwealth,⁷¹ it also released a second Sunday closing law opinion, *Lakeside Inn Corp. v. Commonwealth* (“*Lakeside*”).⁷² *Lakeside* held that in a jury trial, the trial judge could not decide whether the Inn’s operating a Sunday fee-for-use swimming pool, supposedly thereby reducing county-wide nude bathing, was a closing-law “necessity,” exempting it from prosecution. Instead, that was a fact question reserved for the jury. As to exactly how nude-bathing reduction could conceivably become a closing law “necessity,” the reader can only be asked to read on.

Lakeside Inn was convicted of violating the closing law by keeping “open on Sunday a public resort, . . . for . . . bathing, [with] . . . employees . . . selling admission tickets to the pool, . . . [and] furnishing bathing suits”⁷³ Unlike *Pirkey*, *Lakeside* alleged two trial-court

⁷¹ See nn 26 through 70, this **Chapter**, *supra*, and accompanying text.

⁷² *Lakeside Inn Corp. v. Commonwealth*, 134 Va. 696, 114 S.E. 769 (1922). *Lakeside* was the “second” closing law opinion that day, even though (1) earlier (p. 696) in the volume than *Pirkey* (p. 713), and (2) earlier-appealed (January 9, 1922) than *Pirkey* (May 20, 1922). (See *Lakeside*, 134 Va. at 699; and Defendant-Appellants’ “Petition” to the Virginia Supreme Court, 3, at n. 74, *infra*, this **Chapter**.) *Lakeside* confirms this, 134 Va. at 700: “Sunday observance under the [closing law] is discussed . . . in *Pirkey Bros.* . . . , decided today, and much that is there said has an important bearing on the questions hereinafter discussed.” It appears *Pirkey* was issued not so much on its own merits, but to underpin the court’s *Lakeside* opinion, hereinafter discussed in this **Chapter 7(b)(3)**.

⁷³ *Lakeside*, at 696 and 699. Peter Wallenstein, “Never on Sunday: Blue Laws and Roanoke, Virginia,” *Virginia Cavalcade*, 43(1994):132-143, 133, reports *Lakeside*’s prosecution began shortly after “a delegation from a local church arrived on a Sunday [at the Inn], bought tickets, looked around, and then complained that they had been allowed to do so.” Thus, the Inn’s prosecution was apparently sparked by a local church, similar to *Pirkey*, as set forth in n. 28, this **Chapter**, *supra*, and accompanying text.

legal errors, for which proper lower-court foundational objections had been laid.⁷⁴

The supreme court, before discussing *Lakeside*'s facts, explained the rule of law whose application theoretically could justify reversing the jury's guilty verdict:

It is the function of the court to interpret the statute, but . . . the function of the jury, as representative of the morality of the community, to determine "the moral fitness or propriety of the work" in question. But the jury cannot discharge its function, unless it is permitted to hear all the pertinent and relevant testimony on the subject.⁷⁵

The "pertinent and relevant testimony" the court found improperly withheld from the jury, was from witnesses "examined before the judge, in the absence of the jury, so that there is no doubt or uncertainty as to what the testimony would have been."⁷⁶ That testimony, from the county sheriff and one of his deputies, summarized by the court, was that

prior to the opening of Lakeside swimming pool, the persons . . . along . . . streams [near] . . . Roanoke city and . . . roads . . . near those streams, had been shocked . . . by the great number of nude men . . . and partially nude women who could be seen on Sundays bathing . . . and undressing . . .⁷⁷

⁷⁴ Also favoring the appellant was that, unlike *Pirkey*, in *Lakeside* a shorthand reporter recorded all testimony, allowing appellants to present precisely on appeal the excluded evidence and rulings for which they sought reversal. See, *Lakeside Inn Corp. v. Commonwealth*, "Petition for Writ of Error, No. 6453 (Richmond: Virginia Supreme Court [n.d.]), 13, naming the shorthand reporter.

⁷⁵ *Lakeside*, 134 Va. at 701 (emphasis added).

⁷⁶ *Ibid*, at 701-702. In this way, testimony excluded at trial from the jury was preserved. If the party offering it lost at trial and appealed its exclusion as error, the appellate court could review the excluded testimony. If disagreeing with the exclusion and deeming its exclusion significant, the appellate court could set aside the verdict for a new trial. The testimony then could be admitted into evidence on retrial.

⁷⁷ *Ibid* at 702.

Before the pool's opening, they testified, complaints were frequent, with "thirty some" indecent exposure arrests on one Sunday alone. After the pool opened, however, this problem was "greatly relieved," with indecent exposure complaints "practically eliminated," reducing "disorder in the community." The court held: "This testimony had an important bearing on the moral fitness and propriety of the work in question [i.e., Lakeside's pool operation], and it was error [for the trial judge] to exclude it."⁷⁸

The testimonial exclusion the supreme court found to be the first error, led directly to its second determination of error, the trial court's refusal to instruct the jury as follows, as the defendant, Lakeside, had unsuccessfully requested:

[I]f . . . the opening of Lakeside swimming pool on Sunday . . . tends to prevent disorder or indecent exposure . . . along the streams in Roanoke county, . . . and the work . . . was morally fit . . . [for] Sunday, then . . . [the jury] may find that the work [at the pool] . . . is a necessity within the meaning of the [Sunday closing] statute and they should find the defendant not guilty.⁷⁹

The supreme court held "the [trial] court erred" in refusing this instruction⁸⁰ and had erroneously instructed the jury that the evidence presented " . . . no element of necessity either

⁷⁸ *Lakeside* at 703-704.

⁷⁹ Ibid at 705. Defendant proposed four additional instructions, which the trial court also rejected, which the supreme court also reversed , for the same rationale given above.

⁸⁰ Ibid. Unlike *Pirkey*, *Lakeside* "laid the foundation" as lawyers put it, for appellate review of this alleged error, by asking the trial judge that this testimony be heard by the jury with a proper instruction. The judge refused both, thus providing the basis for the appeal of both the evidence excluded and the jury instruction refused.

physical or moral within . . . the Virginia statute for the protection of Sunday,”⁸¹ The Supreme Court concluded that: “Under the testimony actually admitted, and the instructions given, the jury could not have found any other verdict than the [guilty] one found”⁸² and, accordingly, reversed the instruction as well.

The future, however, for Virginia closing law prosecutions, given the holdings in *Pirkey* and *Lakeside*, was decidedly cloudy: *Pirkey* affirmed a jury verdict that Sunday (for-fee) cave-viewing, was not a “necessity,” thus not exempted from closing law prosecution. In seeming contradiction, that court, the same day, reversed a conviction in *Lakeside*, because the trial court barred the jury from deciding if the Inn’s fee-paid bathing was a “necessity,” exempting it from prosecution. To add to the sense of contradiction, the Inn, in *Lakeside*, whose conviction was reversed, had employees working on Sunday, while the convicted cave-owners in *Pirkey*, did not. Thus, the supreme court was prepared to accept, for instance, a defense victory in *Lakeside*’s retrial, based on the supposed “necessity” for the Inn’s Sunday pool operation to alleviate nude bathing, simultaneously with a jury conviction in *Pirkey* criminalizing fee-paid viewing of defendants’ caves. The court conceded that this left closing law questions the jury would decide “unsettled, with nothing for future

⁸¹ Ibid at 706.

⁸² Ibid at 701. Another seeming error, not addressed by the reviewing court, was the trial judge’s assertion in the quoted instruction that the closing law was intended to “protect Sunday,” *ibid* at 706, instruction no. 1. It would be more accurate to say that its constitutionally sanctioned object was to protect people, by allowing them to rest on Sunday.

guidance,” because “different juries may reach different results on the same evidence.”⁸³ Thus, jury verdicts could contradict each other from an ordinary person’s common-sense viewpoint and still be legally sustainable, according to *Pirkey* and *Lakeside*.

The Virginia Supreme Court accomplished this result completely on its own initiative. There was no briefing of any substance by either party in *Lakeside* on this issue.⁸⁴ *Lakeside*’s final paradox, therefore, was that the Virginia high court, citing no authority, had utterly changed the nature of the “necessity” exempting defendants from closing law prosecution. The statute prohibited being, on Sunday, “found laboring at any trade or calling . . . in labor or other business, except in household or other work of necessity or charity.”⁸⁵ This had previously been thought to mean that only the defendant’s own “necessity,” or that of another

⁸³ Quoting from *Pirkey*, at n. 59, *supra*, this **Chapter**, and accompanying text. Recall that *Lakeside* expressly stated that *Pirkey* was applicable to *Lakeside*’s holdings, see n. 72, *supra*, and accompanying text. (Footnote references are to this **Chapter**.)

⁸⁴ The Commonwealth’s brief treated this issue in only two sentences: “The Company [*Lakeside Inn*], . . . undertook to bring the business conducted by it within the exception of the statute by . . . show[ing] that men and women had before . . . this swimming pool gone in swimming in sight of the public road. We do not see how this . . . ha[d] any bearing upon . . . the necessity of conducting . . . business . . . on Sundays.” *Lakeside Inn Corp v Commonwealth*, “Brief on Behalf of the Commonwealth . . .,” Docket No. 6453 (Richmond: Virginia Supreme Court [n.d.]), 11. The Defendant’s “Petition for Writ of Error,” *ibid*, 7, was even terser, saying only: “[T]his Court will recognize . . . , as a matter or [sic, “of”?] public policy, it is to the best interest of our state. . . that persons . . . confined closely to hard labor, during week days. . . have such places as those conducted by the company where on Sundays they can relax.” Whether such Sunday bathing was in “the best interest of our state,” however, appears irrelevant, when the question impliedly presented was how such Sunday commerce constituted a “necessity” for *Lakeside*, which was not directly, however, either asked or answered.

⁸⁵ *Pirkey*, 134 Va. at 717 (emphasis added).

in immediate peril the defendant assisted, excused prosecution. This was suggested by the appellate court when it gave, as an example, a case that was “plainly one of necessity, as where the owner lifts his ox out of the ditch.”⁸⁶

Virginia’s high-court ultimately did not so-interpret the statute, however. In *Lakeside*, the “necessity” was the protecting of the sensibilities of others in the community ostensibly “shocked” by nude bathing, not any “necessity” of the defendant itself, nor of anyone else in peril defendant was attempting to assist. Further, though nude-bathing complaints to the sheriff supposedly abated after Lakeside’s pool opened, that did not necessarily mean former nude bathers were now using Lakeside’s pool on Sunday. Those bathing along roadways arguably did so because they could not afford Lakeside’s Sunday pool charges. Thus, they would not be benefitted, nor the supposed “necessity” of curtailing nude bathing expedited, by defendant’s pool. Although this was arguably contradicted by the sheriff’s testimony of indecent exposure arrests sharply declining after the pool opened, that also could be explained by a vigorous arrest policy that his testimony appeared to reveal.

Regardless of whether Lakeside’s pool-opening reduced nude bathing, beyond ques-

⁸⁶ *Pirkey Bros.*, 134 Va. at 726 (emphasis added), paraphrasing Jesus’s rebuke to “lawyers and Pharisees” in Lk. 14:3-7 (KJV) for stopping sabbath work: “Which of you shall have an ass or ox fallen into a pit, and will not straightway pull him out on the sabbath day?” which they “could not answer.” The court’s paraphrase capsulized the problems of trying to place the closing law’s secular and religious aspects in their ostensibly separate spheres. In the quoted passage Jesus rebukes enforcing Sabbath “rest” in an inflexible, legalistic, way. Some argued that was exactly what state closing laws misguidedly attempted. This was also inferred by Jesus’s chiding of his pharisee and lawyer hosts, v. 3, *ibid*, about whether it was “lawful to cure people [from disease] on the sabbath, or not?” in response to which they, in apparent discomfort, “were silent.”

tion Virginia's high court introduced, in *Lakeside* and *Pirkey*, new "necessity" analysis in Virginia closing law litigation, whose practical effect was to make closing law enforcement more difficult. It also was congenial to, if not caused by, popular disinclination to continue following puritan strictures, generally identified as a significant post-World-War-I viewpoint shift, of which declining obedience to Sunday closing laws would be a prime example.⁸⁷

(4) *Crook v. Commonwealth*: "Play Ball" on Sunday?

An indication of the growth of recreation in the form of spectator-viewed of professional sports was the increasing interwar hold of big-league baseball on the national psyche.⁸⁸ As a result, whether professional baseball on Sunday violated the closing laws was litigated in several states. In Virginia, this occurred in *Crook v Commonwealth*.⁸⁹

In *Crook*, the entire starting teams fielded for the Richmond and Portsmouth minor-

⁸⁷ See n. 20, this Chapter, *supra*, and accompanying text.

⁸⁸ The intensity of interest is evident in *The Greatest Sports Stories from the New York Times*, A. Danzig & P. Brandwein, eds. (New York: A.S. Barnes & Co., 1951), "The Golden Age of Sport, 1920-1930," 139-355. Two of the baseball "greatest sports stories" in this collection were Sunday games, *ibid* at 147 (World Series, Cleveland v Brooklyn, Oct 10, 1920) and *ibid*. at 169 (World Series, Giants v Yankees, Oct 8, 1922) (Sunday dates confirmed by "Perpetual Calendar," *World Almanac-1999*, 320-321). The pressure of major-league Sunday games on minor-leagues for Sunday play, like the Richmond/Portsmouth game in *Crook*, was probably significant.

⁸⁹ 147 Va. 593, 136 S.E. 565, 50 A.L.R. 1043 (1927), citing opinions from three other states, *ibid*. at 598-599, illustrating the frequency of litigation on the topic. To put *Crook* in context, the 1950 version of the closing law, Va. Code Ann. §18-329 (1950) (identically worded to the earlier code versions studied in this thesis), was amended in 1960, beyond the 1942 termination date of this thesis, to exempt "sports" and "athletic events" from its provisions. Va. Acts 1960, c. 267 and c. 358.

league baseball clubs, and the umpires,⁹⁰ were all arrested at a Sunday exhibition game. The circumstances suggest this, perhaps, was a “test case,” that is, a “lawsuit brought to establish an important legal principle . . . ,”⁹¹ of whether Sunday professional baseball was subject to closing law prosecution. These circumstances included: completing the first inning before the arrests so that nine defendants from each team were in play and, presumably, subject to the statute; the clubs’ not charging admission;⁹² the ballplayers’ contract-terms resulting in the game being played at the “request” of the Portsmouth club president, purportedly not by express contract; and sentencing on conviction confined to the five-dollar-per-defendant statutory minimum. Thus, fines for all players and umpires totaled one hundred dollars, relatively nominal for the twenty defendants, even allowing for the dollar’s greater 1927 purchasing power compared to today. Yet the case was tried twice, and appealed.⁹³

The *Crook* defendants claimed immunity because they were not “laboring at a trade or calling” on Sunday as the closing law prohibited,⁹⁴ which the court’s majority brushed aside, easily concluding professional baseball was a “trade or calling,” based on defendant players receiving monthly wages for full-time play. The majority also refused to dismiss due

⁹⁰ One of these umpires, T. A. Crook, was the first-named defendant in the case caption, giving the opinion its citation-name, 147 Va. at 595.

⁹¹ S.V. “test case,” *Black’s Law Dictionary* (7th ed.).

⁹² *Crook*, *ibid*, at 596; although the norm was to charge admission, *ibid* at 599.

⁹³ *Ibid* at 595 (justice court, circuit court, and appeal to supreme court).

⁹⁴ Quoting the statute set forth, *ibid* at 596.

to lack of admission charges since “[t]he Sunday game being more largely patronized, tended to stimulate the interest of the public . . . and thereby increase the gate receipts . . . on week days,”⁹⁵ establishing a commercial purpose for this no-charge exhibition game.⁹⁶

The court in *Crook* also shelved its earlier suggestion, in *Pirkey*, of a “physical/mental work” distinction, so that only “manual labor rather than mental,” was within the closing-law’s prohibition.⁹⁷ *Crook*, to the contrary, concluded one “can be ‘found laboring’ at his desk, in violation of the statute, just as surely as another can be ‘found laboring’ upon his farm.”⁹⁸ This “physical/mental work” distinction, however, appeared irrelevant in *Crook*, since professional baseball has both elements, rendering this analysis dictum only.⁹⁹

Out-of-state decisions reviewed in *Crook* held professional baseball players exempt from Sunday closing laws because those laws were enacted long before “professional baseball clubs were first organized,” and “could not, . . . , have [been] intended to apply to a game not then in existence.” These other state courts, said *Crook*, also gave weight to legislative

⁹⁵ Ibid at 599.

⁹⁶ The dissenters, however, concluded the ballplayers were playing “without compulsion and without remuneration,” and were not “under contract to play exhibition games for their club at all,” and thus were not subject to prosecution. Ibid at 606.

⁹⁷ See nn. 61 and 62, this **Chapter**, *supra*, and accompanying text.

⁹⁸ *Crook*, 147 Va. at 598.

⁹⁹ See n. 30, **Chapter 5**, *supra*, and accompanying text for definition of “dictum.”

failures to expressly prohibit “the playing of baseball on Sunday.”¹⁰⁰ Virginia’s experience was different, said *Crook*, because its closing law was never designated a misdemeanor until amended in 1908, “long after professional baseball was known and played in Virginia. . . .”¹⁰¹ Thus, the court held, the criminalizing of Sunday labor fairly could include professional baseball, along with other types of work.

The court also noted the Virginia legislature failed to adopt a proposed closing-law amendment that would exempt from prosecution “outdoor sports open to the general public” after 2:00 PM Sunday,¹⁰² finding this an “indication of the legislative policy of Virginia.” This supposedly meant, by inference, that the legislature did not favor exempting Sunday baseball from the closing law’s prohibitions. It is difficult, however, to confirm a change in the law by the legislature’s failure to act, as opposed to its taking action.¹⁰³ In *Pirkey and Lakeside*,

¹⁰⁰ *Crook*, 147 Va. at 600-601.

¹⁰¹ *Ibid* at 601. The 1908 amendment is discussed at n. 16, **Chapter 7**, *supra*, and accompanying text. The reasoning of the out-of-state “baseball” cases as *Crook* explains them, appeared flawed, since many occupations, such as paper-mill machinery repair (see n. 2, **Chapter 6**, *supra*, and accompanying text), arose after those states adopted Sunday closing laws, yet no difficulty arose in enforcing such laws against them.

¹⁰² *Crook* at 601.

¹⁰³ *Ibid*.

(1) Abraham Lincoln, in his Cooper Union speech, denied that intent could be inferred from a legislative failure to act, when he argued the Constitution authorized “our Federal Government to control . . . slavery in our Federal Territories.” He documented that a majority of the thirty-nine signers of the original Constitution so-interpreted it when voting later in Congress for issues where such Constitutional authority was necessarily implied. Critical to this discussion was his analysis of two such founding fathers who voted
(continued...)

¹⁰³(...continued)

against proposed legislation that, by its terms, implicitly presumed federal authority to regulate slavery in the Territories. Lincoln cautioned that such votes declining to act, unaccompanied by explanation, could *not* be deemed to mean that those so-voting necessarily thought congress lacked constitutional power to control slavery in the territories:

“... They may have . . . so [voted] because they thought a proper division of local from federal authority, or some provision . . . of the Constitution stood in the way; or they may . . . have voted . . . on . . . grounds of expediency. . . . It, therefore, would be unsafe to set down even the two who voted against the prohibition, as having done so because, in their understanding, . . . anything in the Constitution, forbade the Federal Government to control as to slavery federal territory.”

Abraham Lincoln, “Address at Cooper Institute, February 27, 1860,” *The Collected Works of Abraham Lincoln*, Roy B. Basler, ed, 8 vols. (New Brunswick, N.J.: Rutgers Univ. Press, 1953), 3: 522, 523, 530-531 (emphasis added).

(2) Similarly, in *Crook*, though the legislature rejected an amendment broadening closing law exemptions, why it did so was unstated. Its reasons, paralleling Lincoln’s argument above, could have been unrelated to excluding professional baseball from the closing law exemption. Thus, legislative failure to adopt the measure should not be, by itself, “an indication of the legislative policy in Virginia” as the *Crook* opinion stated.

(a) Paradoxically, the balance of *Crook* proves the above argument: If legislative failure to act changed legislative policy on “necessity” then, by parity of reasoning, the jury in *Crook* should have been barred from deciding if this ball game was a closing law “necessity” or “charity” exemption. This would have been because the Legislature’s failure to adopt a “baseball” exemption supposedly showed, according to the *Crook* opinion, a contrary “policy.”

(b) *Crook*, however, held the jury still should decide if this Sunday ball game was a closing law “necessity,” and therefore free from prosecution. This meant the court found by implication that legislative failure to amend did not change state policy on “necessity.” This shows the difference between inferences that can be drawn from adopting legislation, contrasted with inferences that cannot be drawn from failing to adopt legislation. Thus *Crook* contradicted itself, on the one hand treating legislative non-action as a “policy” change, while still allowing the jury to decide the issue that the legislature’s

(continued...)

as previously described ¹⁰⁴ (reaffirmed and quoted in *Crook*), the Court effectively broadened exemptions to the Sunday closing law, and procedural changes that made closing law cases more difficult to prosecute.

The *Crook* jury instructions scrupulously followed *Pirkey* and *Lakeside Inn*, directing that whether this Sunday professional baseball game was “a work of necessity within the meaning of the statute, is a question for the jury. . . .”¹⁰⁵ Thus, despite everything previously discussed, *Crook* boiled down to whether the jurors thought this particular Sunday professional baseball game was a “necessity” exempting it from prosecution.¹⁰⁶ *Pirkey* recognized this meant that “different juries may reach different results on the same evidence,”¹⁰⁷ yet that was what the supreme court approved. In short, in *Crook* the Virginia Supreme Court,

¹⁰³(...continued)
declining to act supposedly settled.

(3) In the *Francisco* trial, **Chapter 8**, *infra*, the Commonwealth’s attorney also made the same argument as that Abraham Lincoln’s quoted in part (1), and applied in part (2) this footnote. See n. 120, **Chapter 8**, *infra*, and accompanying text. This shows it was not an interpretive rule that favored one “side” or the other in a closing law case.

¹⁰⁴ *Supra* at 26-87, this **Chapter**, and accompanying text.

¹⁰⁵ *Crook*, 147 Va. at 602, *ibid* at 604: “[C]areful consideration of these instructions fails to disclose any error.”

¹⁰⁶ *Crook* exempted amateur ballplayers from the closing law: “Unlike the professional player, whether he plays on Sunday or a week day, the amateur engages in the game as a sport and not for . . . procuring a livelihood.” *Ibid* at 599.

¹⁰⁷ *Pirkey*, 134 Va. at 726-727.

without overruling prior holdings, accommodated the objects of the Sunday closing law, while still allowing itself maneuver room to later change its thrust, if it chose to do so.

(5) *Williams v Commonwealth: Movies on Sunday?*

The problems posed by Sunday closing laws for profit-based motion picture film exhibitors were first considered on appeal in Virginia in *Williams v Commonwealth*.¹⁰⁸ Before reviewing *Williams*, however, it is useful to consider Professor Wallenstein's historical study of the closing law's impact, among other things, on Roanoke 1930s film exhibitions.¹⁰⁹

A copy of a 1935 announcement illustrated in the above-referenced Roanoke study, publicizing a Sunday film exhibition is attached."¹¹⁰ declaring: "NEW PRICES effective tomorrow SUNDAY," listing the ticket prices, followed by the statement: "Starting Tomorrow Sunday[,] **Jean Harlow and William Powell in 'RECKLESS'.**" In its smallest type, is written: "SUNDAY PERFORMANCES by and for the benefit of Chapter 3 of United Spanish War Veterans and Auxiliary."¹¹¹

This "announcement" in **Exhibit "A"** of a Sunday movie brings to mind the court's discussion in *Crook* (though *Crook's* Sunday game was admission-free) that Sunday

¹⁰⁸ 179 Va. 741; 20 S.E.2d 493 (1942). To put *Crook* in context, the 1950 version of the closing law, Va. Code Ann. §18-329 (1950) (identically worded to the earlier code-versions studied in this thesis), was amended in 1954, after the 1942 termination date of this thesis, to exempt "operation of motion picture theatres," from its provisions. Va. Acts 1954, c. 131, pp. 127-128.

¹⁰⁹ Wallenstein, "Never on Sunday," see n. 73, this **Chapter**, *supra*.

¹¹⁰ Ibid at 138. See copy in *Appendix*, **Exhibit "A."**

¹¹¹ Ibid.

attendance “tended to stimulate the interest of the public in professional baseball and thereby increase the gate receipts . . . on week days.”¹¹² Replacing “professional baseball” in this quotation with “motion pictures,” could describe **Exhibit “A’s”** purpose as well. That is, Sunday attendance, *Crook* suggested, as a matter of practical business, promoted more revenue the rest of the week.

In this context, on Sunday, March 24, 1935, Professor Wallenstein recounted Roanoke’s American Theatre manager, S. G. Richardson, was arrested for selling tickets and presenting films that day, and “[a]ccused of violating a local ordinance against Sunday movies[.] [H]e was convicted in the Roanoke Civil and Police Court . . . , [and] paid a fine of two dollars. . . .”¹¹³ For seven weeks this scenario recurred, so that by “mid-May, Richardson had been convicted . . . seven different times for violating Sunday closing laws,” all of which he appealed on the ground that “each one of the Sunday performances had been advertised as a benefit for “Chapter 3 of the United States Spanish War Veterans Auxiliary.”¹¹⁴ While awaiting dispositions of his appeals, Richardson continued to sell tickets, and exhibit Sunday films. Professor Peter Wallenstein asserted that, in 1935, “Richardson could have been required to post a substantial bond. But the judge decided that he had no

¹¹² *Crook* at 599. Earlier quoted, n. 95, this **Chapter**, and accompanying text, *supra*.

¹¹³ Wallenstein, “Never on Sunday . . . ,” 136-138, n. 73, this **Chapter**, *supra*.

¹¹⁴ *Ibid*. His next six convictions were under state law, not municipal ordinance. In the first of these, his fine was ten dollars, the remainder incurred fines of \$25 each.

authority to do so while the cases were under appeal.”¹¹⁵

Seeming inaction followed these convictions because the judge to whom they were appealed “was ill, and his replacement declined . . . to become embroiled in potentially volatile Sunday-closing cases.” The *Roanoke Times* observed that

[T]he unedifying spectacle [continues] of Sunday movies ruled illegal. . . for six or seven consecutive weeks, an appeal noted to a higher court, and a . . . theatre [sic] continuing to open . . . Sunday after Sunday, with no disposition . . . to press the issue and get the thing settled definitely ¹¹⁶

The deadlock was broken by a May 1935 appointment of another out-of-town judge for a retrial deciding if Richardson should be acquitted under the Sunday law’s “necessity” or “charity” exclusions. At the retrial, “the five-man jury could not agree Three members voted to convict; two disagreed. At a second trial in July, however, Richardson finally won acquittal.”¹¹⁷

On 19 July 1935, the [local newspaper] editor remarked that the issue seemed settled,[:] “[T]heatres of . . . [Roanoke] can throw open their doors on Sunday . . . without hindrance by the authorities.” Not even the pretense of a charitable purpose would be required “Sunday movies,” he added, “are not a necessity, in the strictest sense . . . , but neither are they objectionable.” [I]f there is . . . sentiment . . . in favor of them, we can see no objection . . . Certainly the trend generally seems to be in that direction”¹¹⁸

These 1935 experiences of a Roanoke theater manager in the local police court and

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

appeals therefrom, as extracted from Professor Wallenstein's study,¹¹⁹ suggested Sunday film exhibitors had possible, though not iron-clad, chances of escaping the somewhat indifferent local closing law prosecutions. *Williams*, in 1942, improved such defendants' odds by making Sunday "charitable" exemptions not only easier to claim but also, as will be seen, effectively reducing operational costs to businesses benefitted by them.¹²⁰

Williams, in its essence, was a jury instruction battle. The trial judge approved instruction "V," concerning defendant theater manager, providing that:

"[W]ork of charity" . . . means . . . that if the defendant was working at his usual trade or calling which . . . is not charitable, and was receiving consideration for such work even though the net proceeds . . . of his labor are given to charity, he has violated the statute¹²¹

How the Sunday charity film exhibitions operated in *Williams* was explained as follows:

[T]he [theater] owners . . . arrange[d] . . . with the Junior Woman's Club [to] . . . operate[] on Sundays, and the net proceeds above actual operating expense would be turned over to the Junior Woman's Club for . . . charitable work . . . [to a \$1,000 total, estimated to take four to six months].¹²²

Thus, in *Williams*, the theater-owner's charitable contribution was carried out by its agree-

¹¹⁹ Supra, nn. 110 through 118, this **Chapter**, and accompanying text.

¹²⁰ *Williams* quoted, without discussion, new closing law exemptions, 179 Va. at 740: "This section shall not apply . . . to the sale of gasoline, or any motor vehicle fuel, or any motor oil or oils." Va. Code Ann. §4570 (1919), as amended by Va. Acts 1932, c. 328 (March 25, 1932). For the closing law reducing operating expenses, see n. 126, this **Chapter**, *infra*.

¹²¹ *Williams*, 179 Va. at 748-749. The supreme court ultimately rejected this instruction, see n. 124, this **Chapter**, *infra*, and accompanying text.

¹²² *Ibid*, 743-744.

ment to donate to a bona fide charity the Sunday profits of the theater from film receipts (less operating expenses) up to \$1,000. The *Williams* trial court jury instruction, however, provided that even with all those elements in place, the defendant theater manager could not avail himself of the “charity” exemption from prosecution for Sunday work, unless he received no pay for his regular work of managing the theater on that Sunday. Defendant Williams objected to the trial-court instruction “V” quoted above, and unsuccessfully insisted at trial that, instead, the court should have given his following proposed instruction “A”:

[I]f . . . [the jury] believe . . . that the [theater] exhibitor[s] . . . received no compensation from the proceeds of the Sunday . . . motion pictures . . . and . . . proceeds above actual operating expenses are . . . used for charitable purposes, then you should find the defendant not guilty. . . . [T]he payment out of gross receipts of the actual expenses . . . in operating the theatres on Sunday [is not] . . . compensation to the exhibitor.¹²³

The Virginia Supreme Court held “it was reversible error for the [trial] court to give instruction ‘V’ . . .” Instead, the court ruled, “instruction ‘A’, which the trial court refused[,] properly gave the true . . . application of the statute to . . . this case.”¹²⁴ The high court favored defendant’s proposed instruction “A” over the instruction “V” the trial court gave, because:

We do not think that the test as to whether the particular work of [defendant] Williams was to be found solely in his actual work itself to the exclusion of a consideration of the primary purpose of the exhibition; to-wit, that the profits will be devoted to charity. . . .

[T]he record shows a plan to dedicate to charity a substantial sum Yet

¹²³ Ibid at 748.

¹²⁴ Ibid; supreme court rejected instruction “V,” as discussed at n. 121, this **Chapter**, *supra*, and accompanying text.

instruction “V” told the jury that they could not consider this fact which, according to our view, was the principal element The actual work of Williams [defendant manager] was purely incidental if the exhibitions were solely for charitable purposes, and here this has been conclusively shown.¹²⁵

Williams made a significant difference in the commercial feasibility of using the “charitable” closing law exemption, contrasted with previously-quoted instruction “V” which the trial court was reversed for using. Instruction “V” denied defendant Williams the charitable exemption at trial because he was paid for supervising the theaters’ Sunday “charitable” film exhibition. Virginia’s high court, in contrast, deemed his salary “purely incidental” to the film exhibition’s “charitable purposes” which the court held to have been “conclusively shown.”

In *Williams*, the supreme court effectively stood the closing law on its head. The law’s eighteenth century purpose was providing Sunday rest by barring Sunday employment. In contrast, the theater employees in *Williams*, including the defendant manager, were working on Sunday, not resting. Further, the supreme court approved using charitable proceeds thereby obtained to pay Sunday employee wages and operating expenses for the theater, thereby encouraging, rather than discouraging, labor on Sunday.

A theater using the closing law’s “charitable exemption” to avoid Sunday prosecution, as *Williams* approved, potentially could make a greater profit than another theater, closed on Sunday, but with equal non-Sunday gross revenues and expenses, all other things being equal. Although such a “charitable exemption” theater must surrender its Sunday net profits to charity, the *Williams*-approved jury instruction allowed it to satisfy its Sunday operating

¹²⁵

Ibid, 748-749 (emphasis added).

expenses from its Sunday charity receipts. This could reduce the amount of operating expenses needing to be paid from gross revenues received the other six days of the week's business, effectively increasing its net profit.¹²⁶ Thus, through the economic incentives provided by the closing law charity exemption as interpreted in *Williams*, that law could effectively act precisely contrary to its original purpose of reducing Sunday labor. Further, the increase of net profits in this way probably assured increases in Sunday employment.

(c) Conclusions About Twentieth-Century Virginia Closing Law Appeals Before *Francisco*.

Frederick Lewis Allen pinpointed World War I's aftermath as the beginning of a "subtle change" to "shake off the restraints of puritanism."¹²⁷ Popular disaffection with closing laws would be an example of such "change."¹²⁸ Virginia anti-closing-law sentiment arose slightly earlier. Appellant-plaintiff in *Hortenstein v. Virginia Carolina RR*, the first twentieth-century Virginia closing law appeal, however, did not reflect this trend; unsuccessfully

¹²⁶ Paying Sunday contingent operating expenses from charitable proceeds, like wages, would not necessarily increase net profits, since these expenses would generally increase as revenue increased. Paying Sunday fixed operating expenses from Sunday charitable proceeds, however, (apportioned to meet the Sunday portion only [1/7 of the week] of those expenses), such as the lease (or mortgage), insurance, and property taxes, reduced what must otherwise be paid for those expenses from receipts of the remaining six days of the week (other than Sunday). In this way, net profits from overall theater operations were increased through partial satisfaction of theater fixed expenses from charitable proceeds (revenue which would not have been realized had the theater not operated on Sunday).

¹²⁷ See n. 20, this **Chapter**, and accompanying text, *supra*.

¹²⁸ The relation between puritanism and Sunday closing laws is discussed at nn. 4 - 18, **Chapter 4**, *supra*, and accompanying text.

attempting to apply closing laws to liability arising from Sunday personal injuries.¹²⁹ The remaining two pre-World War I-Armistice twentieth-century appeals, however, arose in an entertainment or leisure context. The first, *Hanger v. Commonwealth* (1908), held the closing law could not be avoided through an incorporated “social club” from which “members” purchased Sunday cigarettes, soft drinks and sundries.¹³⁰ The second, *Ellis v. Covington* (1917), seemed to state, in non-binding dictum, that a restaurant’s selling Sunday meals and soft drinks, even with a municipal license, unconditionally violated the closing law,¹³¹ further discussed hereinafter.¹³²

Both *Hanger* and *Ellis* could hardly have arisen without a market-demand from consumers with sufficient leisure and disposable income to significantly support the controverted Sunday sales, which authorities sought to interdict by closing law prosecutions. It appears that growth of such retail consumer markets significantly influenced closing-law interwar Virginia Supreme Court appeals. That court’s closing-law decisions, with minor exceptions, reflected a greater sympathy for Sunday commerce, than providing a Sunday “day

¹²⁹ See nn. 10 - 15, this **Chapter**, *supra*, and accompanying text. *Wells*, another pre-World War I twentieth-century closing law case, discussed at nn. 6 - 8, this **Chapter**, *supra*, and accompanying text, immediately after *Hortenstein*, did not disclose the nature of its closing law offense, but treated only the propriety of the punishment imposed for the violation.

¹³⁰ At nn. 10 - 15, this **Chapter**, and accompanying text, *supra*.

¹³¹ At nn. 17 - 18, this **Chapter**, and accompanying text, *supra*.

¹³² See nn. 109 - 113, **Chapter 8** and accompanying text, *infra*.

of rest” to ordinary workers, the supposed object of the closing law.

From the World War I Armistice through the 1942 conclusion of this thesis, the appealed closing law cases unfolded much in accord with Frederick Lewis Allen’s observations. Subtly underlying the reported decisions can be seen, from their fact statements and documentation supplied in the thesis outside of the case-law, manifestations of public disaffection with puritan strictures, such as closing laws. This was reflected in part by a public insistence, as a practical matter, divorced from ideology, on access to entertainment and dining on Sunday, carried out by paid employees on that day, like any other day, contrary to the closing law’s ostensible intent.

As a prelude to this apparent interwar relaxation of closing law enforcement, one legal hiccup remained. The conviction-failures in *Wells* and *Hanger*,¹³³ ostensibly resulted from the statutory text not expressly describing the statute as criminal. An explicit criminal sanction was inserted in the closing law by a 1908 amendment effectively overruling *Wells* and *Hanger*.¹³⁴ Virginia’s high-court, however, with fair consistency, construed the statute so as to favor Sunday business, as opposed to concerns for worker-rest on Sundays, the closing law’s supposed purpose.¹³⁵ The court would not countenance crude, head-on charges against the closing law, like the bogus “social club”druggist S. T. Hanger clumsily and unsuccessfully

¹³³ At nn. 6 - 15, this **Chapter**, and accompanying text, *supra*.

¹³⁴ See n. 16, this **Chapter**, and accompanying text, *supra*.

¹³⁵ See discussion of *Wells* at nn. 8 and 12; this **Chapter**, and accompanying text, *supra*.

attempted.¹³⁶ It tended to acquiesce, however, to more subtle arguments undermining closing laws, reducing their effectiveness in a context which, with reasonable consistency, favored business efficiency and profitability. The result was a mimicing, in closing law litigation, of what British military historian B. H. Liddell-Hart described as the “indirect approach” in warfare: “Avoid a frontal attack on a long established position; instead, seek to turn it by flank movement, so that a more penetrable side is exposed”¹³⁷ It was to such “indirect approach”¹³⁸ attacks on closing laws that the Virginia Supreme Court favorably responded. These supported what Virginia’s appellate judges appeared to perceive, namely that Virginia citizens after World War I, even though their conduct exhibited dissatisfaction with the Sunday closing law, did not seek its outright repeal, so long as judicial interpretations allowed them to remain relatively unaffected by its ostensible labor-reduction purposes. This accorded with what happened in *Commonwealth v. Pirkey*, including (1) a legislative broadening of closing law exemptions for manufacturers; (2) expanding the “necessity” exemption to include matters that were perceived to have become necessities “in view of modern circumstances of life,”¹³⁹ but may not have been “necessities” at the closing law’s eighteenth-century enactment; (3) allowing a closing law “necessity” that need not be “physical” or “absolute;” (4) requiring

¹³⁶ See nn. 10 - 15, this **Chapter**, and accompanying text, *supra*.

¹³⁷ B.H. Liddell-Hart, *Strategy* (New York: Praeger, 1955), 19-20.

¹³⁸ *Ibid.*

¹³⁹ See n. 63, this **Chapter**, *supra*, and accompanying text.

jury-decisions for virtually all major closing law issues, rather than judicial rulings.¹⁴⁰

To confirm the complete extent and all the reasons for the apparent decline in enforcement of the closing law during the circa 1920-1940 interwar years would require an examination of appellate cases, the appellate judges who presided over them and the personalities who participated in them. This would need to be undertaken with an intensity and scope comparable to, or exceeding, the review that will later be undertaken of the *Francisco* trial in **Chapter 8** of this thesis.

Such an investigation should attempt to confirm or refute, the effect of the following as potential causes of declining closing law enforcement: First, greater self-transportation due to greater auto ownership. This logically led to more restaurants, sporting events and other Sunday activities such travel attracted, which the public wanted on Sunday, in nominal violation of the closing laws. Second, national prohibition's repeal in the early 1930s also increased the attractiveness of such roadside sales, dining and entertainment, by including sale of alcoholic beverages. Third, particularly in the 1930s, a desire to shake off the throes of the great depression, by encouraging additional employment, including on Sundays. Fourth, the increase of defense work, with its emphasis on twenty-four hours per day, seven days per week plant operation would erode, as a practical matter, strictures against Sunday work. Fifth, many seeking appointments as Virginia appellate judges could well have been products of successful business backgrounds and law firms with ingrained preferences against govern-

¹⁴⁰

See *Pirkey Bros.*, nn. 57 through 60, this **Chapter**, *supra*, and supporting text.

ment policies encouraging expansion of business and industry and for less government regulation. Such lawyers, when elevated to the bench, while not necessarily dismissive of the closing law, perhaps tended to interpret its ambiguities in ways favoring business expansion, on Sunday or any other day. Some combination of the above factors likely accounted for the consistently permissive attitude of the public and the appellate court, concerning “necessity” or “charity” exceptions to Sunday closing law enforcement.

Two other dynamic interwar closing law changes achieved by the Virginia Supreme Court were (1) judicial expansion of closing-law “necessity” further exempting Sunday labor from closing-law prosecution in *Lakeside Inn Corp. v. Commonwealth*; and (2) expansion of the “charity” prosecution-exemption of the same law in *Williams v. Commonwealth*.

Lakeside permitted the exemption to apply not only to the “necessity” of the defendant or those with whom defendant dealt directly, but also to the defendant’s actions arguably affecting the world at large, whether defendant intended any “necessity” benefit from them or not. This led to the Virginia high-court’s remarkable ruling that the defendant Inn was entitled to a “necessity” closing law exemption should the jury find, on retrial, that opening the Inn’s pool reduced Sunday nude bathing in drainage ditches adjoining public roadways in the rest of the county where the pool was located.

In evaluating the *Lakeside* “necessity” issue, it is instructive to examine the **Exhibit “B”** (Appendix) photo of the Inn’s pool from the Wallenstein article about Roanoke, Virginia,

closing law enforcement.¹⁴¹ In particular, the ambiance of the formally dressed patrons at the pool area (being serenaded by a dance orchestra, according to the **Exhibit “B”** picture caption), renders it difficult to believe the Inn’s pool was planned or financed with any expectation of reducing Sunday nude bathing. The well-coiffured Inn patrons pictured, furthermore, do not resemble those the Sheriff described at the *Lakeside* trial as arrested for nude swimming in drainage ditches adjoining public highways (such arrests supposedly being “greatly relieved” due to, the pool’s opening).¹⁴² The apparently high-society individuals in the photo, **Exhibit “B,”** seemed unlikely to be those who changed their aquatic habits from roadside ditches to Lakeside’s pool to escape indecent exposure arrests. Nevertheless, the high Court concluded the alleged reduction in nude bathing created a “necessity” jury issue on whether the decrease justified operating the Inn pool on Sunday.¹⁴³

During the interwar era Virginia’s high court, as *Lakeside* exemplified, tended to interpret closing-law statutory ambiguities in ways benefiting increases in Sunday commerce. The practical result was to diminish the closing law’s intended ameliorative, Sunday labor-reducing, purpose. This was true even though in some cases, such as *Crook v. Common-*

¹⁴¹ The photo, **Exhibit “B”** in the attached Appendix, is from Wallenstein, “Never on Sunday,” n. 73, this **Chapter**, *supra*. **Exhibit “B”** is at 135 in the Wallenstein article, *ibid*. The article suggests **Exhibit B** was taken at about the time of the 1921 *Lakeside* trial.

¹⁴² See n. 78, this **Chapter**, *supra*, and accompanying text.

¹⁴³ See nn. 76-78, this **Chapter**, *supra*, and accompanying text. The actual decision was a reversal for new trial, because the trial court jury instructions mandating a verdict against the Inn were deemed incorrect by the higher court.

wealth, the appellate court affirmed a trial court verdict rejecting a “necessity” exemption for Sunday professional baseball. The Virginia high court made clear in *Crook* that its affirmance was because the question was entirely one of fact for the jury to decide. Under *Pirkey* and *Lakeside*, the *Crook* opinion continued, later juries could reach the opposite conclusion on the same facts.

The supreme court’s inclination to encourage Sunday commercial activities, thereby limiting the rest from labor sought by the Sunday closing law, reached something of an apo-gee in *Commonwealth v. Williams* (1942).¹⁴⁴ There the court approved a “charity” closing law exemption for a Sunday motion picture where the net profit of that showing, after subtracting operating expenses from gross receipts, was contributed to a bona fide charity.¹⁴⁵ *Williams* further found the theater-manager-defendant was not subject to closing law prosecution merely because his salary for Sunday management of the theater was part of those expenses. If the “primary purpose of the [film] exhibition” was “that the profits will be devoted to charity,” held the court; then the manager’s Sunday “actual work” and resulting salary was “purely incidental,” for which he could not be prosecuted under the closing law.¹⁴⁶

Williams offered businesses using the closing law charitable exemption an opportunity for increased profits by so doing. This was because the court approved the a theater’s

¹⁴⁴ See, generally, nn. 120 - 126, this **Chapter**, *supra*, and accompanying text.

¹⁴⁵ The applicable portions of the Virginia Closing Law, *circa* 1942 (the date of the *Williams* decision), is set forth in the text accompanying n. 6, **Chapter 2**, *supra*.

¹⁴⁶ See text supporting n. 125, this **Chapter**, *supra*, quoted from *Williams* opinion.

subtracting its Sunday operating expenses from its Sunday charitable gross receipts. This appeared to include satisfying fixed operating expenses (such as rent [or mortgage], insurance and property taxes), pro rata from Sunday charitable revenues, reducing the amount of such expenses needing satisfaction from revenues of the rest of the week. The prospective result was greater net profits, overall, for businesses taking advantage of the charitable exemption under the Sunday closing law, than if they did not operate on Sunday. The further result was that the Sunday closing law, instead of achieving rest for from labor on Sunday, accomplished the opposite, encouraging more Sunday labor on a charitable exemption basis, with potentially greater profits for the business taking advantage of the exemption.¹⁴⁷

¹⁴⁷See nn. 120 - 122 and 126, this **Chapter**, and accompanying text.

Chapter 8: REVISITING *FRANCISCO* v. *COMMONWEALTH*—THE TRIAL.

(a) Introduction.

The Virginia Supreme Court's 1942 *Francisco* v. *Commonwealth* opinion was already reviewed.¹ That discussion concluded by asking: (1) Why was Mr. Francisco prosecuted for Sunday beer sales when eighty percent of licensed county merchants also doing so were not? (2) Did the supreme court-ordered new trial ever occur?

To answer these questions, **Chapters 3** through **7** reviewed the development of Sunday closing laws. What was learned allowed clearer answers to the above questions and better understanding of such laws in general. This **Chapter 8**, besides offering answers to the questions posed above, also examines details of the *Francisco* trial not contained in the appellate opinion discussion in **Chapter 2**, and reveals how the trial re-echos major themes concerning Virginia closing law history.

(b) *Dramatis Personae* and Similar Matters in *Francisco*.

It is useful, in analyzing the *Francisco* trial, to first consider the following significant personalities and other matters related to it.

(1) Transcript and Court Record.

Locating *Francisco*'s trial-transcript was a problem. Inquiry at the Hanover County Circuit Court revealed a bare cupboard. Prodigious searches by the Clerk's office, disclosed only a few *Francisco*-related documents. The transcript and virtually all trial-papers could

¹ See, **Chapter 2**, herein, *supra*.

not be found.² Fortunately, the Virginia Supreme Court retained Defendant's *Petition for Writ of Error* ("Petition") in *Francisco*, with transcript, brief, rulings and other papers from the 1941 trial and the 1942 appeal, attached to the Appendix herein as **Exhibit "C,"**³ along with the Commonwealth's responsive brief, also attached as **Exhibit "D."**⁴

(2) The Prosecutor: Attorney Edward F. Simpkins, Jr.

The current Hanover County Commonwealth Attorney's office explained its records only commenced with its professionalization after World War II. Before then, it explained, Hanover County Commonwealth Attorneys were in private practice, representing the Commonwealth along with other clients, and kept their prosecutorial files when their terms ended like any other client files. In any event, neither former Commonwealth Attorney Edward P. Simpkins, Jr., nor his files, could be found.

(3) The Defendant: M. G. Francisco.

Defendant M. G. Francisco was deceased, but telephone listings with his surname led to his son T. Waddy Francisco, whose bitter explanation for the trial was "Joe Johnson, the

² No fault for this, if any there be, falls on today's Hanover County Clerk's Office. Deputy Clerk Thomas Carlson, criminal division head, exhaustively searched and provided every assistance, including accessing documents, photocopy facilities and work space. Thanks are extended to him and to the Hon. Frank D. Hargrove, Jr., County Clerk.

³ **Exhibit "C,"** Appendix: M. G. Francisco v. Commonwealth, [Defendant's] *Petition for Writ of Error*["Petition"] No. 2633, filed September 16, 1942 (Richmond: Virginia Supreme Court). (*Page references are to the Petition page numbering itself, NOT the page numbering of internal documents within the Petition.*)

⁴ **Exhibit "D,"** Appendix: M. G. Francisco v. Commonwealth, *Brief on Behalf of the Commonwealth*, Record No. 2633, filed October 8, 1942 (Richmond: Va. Sp. Ct.).

County Supervisor, didn't like my old man." Johnson, he said, attended the trial, reminding the Judge during recesses to "don't forget who made you a judge."⁵ His recollections of prejudice, as he saw it, of Johnson toward his father, were not "history" for him, but a present, living-memory. It would be unwise scholarship, however, to solely rely on anyone's sixty-year old memories, no matter how sincere or intense.

T. Waddy Francisco's description of County Supervisor Johnson, however, possibly explained some testimony of witness Charlie Williams in the *Francisco* transcript:

Q. Where do you live, Mr. Williams?

A. I live on Mr. Johnson's place.

Q. What Johnson?

A. Joseph Johnson.

Q. Joseph Johnson?

A. Yes, sir. He is in the courtroom.

....

Q. Where does Mr. Cauthorne live?

A. Mr. Cauthorne, he lives on Mr. Johnson's place.

Q. The same Mr. Joe Johnson who is sitting in this courtroom?

A. Yes, sir.

Q. He [Cauthorne] is the other [complaining] witness in this case, isn't he?

A. I suppose so.

Q. Who took you up there to Mr. Francisco's [on Sunday, September 7, 1941]?

A. Mr. Nichols.

....

Q. Well, can you explain how you and Mr. Nichols and Mr. Cauthorne all happened to meet in Mr. Joe Johnson's house this Sunday afternoon?

A. Well, I couldn't tell you that. I can't answer that question.⁶

⁵ T. Waddy Francisco, telephone interview, February 22, 2002. His phone number was obtained from his son, Peter, an executive at Lakeside Appliances, Richmond, Va.

⁶ Exhibit "C", *Petition*, 43-45 (emphasis added). The witnesses given name was shown in the transcript as "Charlie," not "Charles," *ibid* at 42 and 99 (transcript index).

This testimony seemed unconnected with the rest of the case, before the Francisco phone interview. Comparing the two, however, suggested possible connections: Williams, one of the *Francisco* Sunday beer purchasers, testified to living “on Mr. Johnson’s place.” Furthermore, Williams’ testimony recites, Johnson was at the trial when he (Williams) testified, as T. Waddy Francisco recalled about “Supervisor Joe Johnson.” The transcript did not identify this “Joseph Johnson” as a Supervisor, as Mr. Francisco recalled. It seemed unlikely, however, that another “Joseph Johnson” was at the trial, other than one well-enough known in this small community, that his name alone, as the cross-examiner used, was enough for all to know who was meant.

The above transcript extract also suggested Johnson’s primacy in the prosecution: (1) Complaining witness Charlie Williams said he met the other two complaining witnesses at Johnson’s home for the Sunday beer-buy at Francisco’s; and (2) Two of these three witnesses, he testified, were Johnson’s tenants. Not confirmed, however, was Mr. Francisco’s recalling Johnson as a County Supervisor. Johnson was, indeed, a County Supervisor, but not until December 30, 1941, over two months after the trial was over.⁷ He was appointed by none other than the Honorable Leon M. Bazile, the *Francisco* trial judge, as revealed in the Court’s Order Book providing in part:

It appearing to the Court that T. M. Thompson, the member of the Board of Supervisors of Hanover County from Beaver Dam District, has departed this life, thereby creating a vacancy in said office, IT IS ORDERED that J.Z.

⁷ The transcript shows all trial proceedings occurring on one day, October 17, 1941. See Ex “C”, *Petition*, 35 (trial commences) and 93 (verdict).

Johnson, a qualified voter resident of Beaver Dam District, Hanover County,
be and he is hereby appointed Supervisor . . . to fill the unexpired term. . . .

[no signature]

Leon M. Bazile, Judge⁸

Thus, according to the Order Book, it was not Johnson, the Supervisor who, to paraphrase T. Waddy Francisco, “made him [Bazile] a Judge” but rather Bazile, the Judge, who made Johnson a Supervisor.

(4) The Newspapers.

Given current (circa 2005) coverage of spectacular criminal trials by television, it is hard to believe that the 1941 *Francisco* trial, carrying a fine-only penalty, ultimately five dollars, was big news. Richmond’s two daily papers, however, provided front-page coverage. The Judge’s order prohibiting Sunday beer sales garnered a favorable Methodist Conference resolution as well, also on the front-pages.⁹

⁸ Common Law Order Book No. 19 (June 8, 1939–November 20, 1944), Hanover County Cir. Ct.) (Clerk’s Office, Hanover County, Virginia), December 30, 1941, p. 214 (photo-reduced and **Attached as Exhibit “E”**) (capitals in original). Circuit judges made such appointments pursuant to Va. Code Ann. § 136 (1919). Section 5962, *ibid*, also required: “The proceedings of every court shall be entered in . . . the order book.” *Snodgrass v. Commonwealth*, 89 Va. 679, 687; 17 S.E. 238 (1893) held that order book entries need only be read in court in the term entered to be valid, meaning the Judge’s failure to sign the appointment he made in the Order Book, **Exhibit “E”**, did not invalidate it.

⁹ *Richmond News-Leader*, October 18, 1941, 1: **“Bazile Beer Ban Hailed by Methodists; . . . : The Virginia Methodist Conference meeting today in Lynchburg, adopted a resolution hailing ‘with joy’ Judge Bazile’s decision that the sale of Beer on Sunday violated Virginia’s blue law. . . .”** *Times-Dispatch*, October 19: **“Methodists Praise Ruling on Beer Ban,”** 1, identifying resolution sponsor, J. W. Moore, as president of “Virginia Anti-Saloon League.” *News-Leader*, October 18, 1941, trial coverage on p. 12: **“Bazile Will Hear Argument on Blue Law Beer Verdict.”** [All italic and bold-faced type in the originals.]

(5) **The Judge: Honorable Leon M. Bazile.**

Papers of the late Leon M. Bazile, Circuit Judge (1890-1967) ("*Bazile Papers*"),¹⁰ are at the Virginia Historical Society. The Society's *Guide* to his *Papers* revealed he was a graduate of T.C. Williams School of Law, University of Richmond (1910), who after private practice, served in the Virginia Attorney-General's Office (1916-1930), interrupted by World War I Army duty in France. His prewar Assistant Attorney-General service intertwined with his courting of Virginia Hamilton Bowcock (1889-1970). Some of his letters to her he called his "briefs," proselytizing his Baptist fiancée about his Catholic faith. None of the *Papers* show either converted the other but they married, nevertheless, on January 26, 1918.¹¹

¹⁰ Leon Maurice [Nelson] Bazile Papers, 1826-1967, MSS1 B33483 a FA2 (Richmond: Virginia Historical Society, accessioned December 14, 1987) ("*Bazile Papers*"). The Society's 18-page "Description and Guide" ("*Guide*") for the *Papers*, advised there were over 10,000 items, in 27 archival boxes. The Judge's other interior name, "Nelson," bracketed in this footnote, *ibid*, is from the *Guide*, as is the other information in the text.

¹¹ *Guide*, 3-4, n.10, *ibid*. Each of the pair engaged in a seemingly complicated yet familiar minuet danced to one of one of the world's oldest tunes. He was verbally aggressive, and she, perhaps more effectively, seemed to yield, thereby raising his intensity. Thus, he wrote what he called a July 24, 1917, "Reply Brief" letter stating he realized she had "determined never to marry." He "never loved anyone as I do you and I shall never love anyone else in the same way." He described his courtship, however, in military metaphor: "Battles have never been won by giving up. I am sure the problem can be solved if we will but try." She responded in a way that could hardly fail to increase his ardor: "I do wish I could help you in some way just now when you need me most, but instead of being a help to you I am only another Problem to cause you worry and anxiety. If our Problem were only solved I might – but I won't tell you any more until it is solved or it would be useless. Leon, I am sure we can never find a 'common ground' unless you could accept my faith, but I would not and could not ask you to do that unless you could truly believe in the Baptist Doctrines and be as sincere a Christian as you are now. Try to forget all about me, I often wonder why God brought us together, perhaps some day [I] will understand [dated July 31, (continued...)]

After his Attorney-General service, Bazile practiced law privately for eleven years (1930-1941) including four years in Virginia's General Assembly (1936-1940). Appointed circuit judge in 1941, he served until illness forced a 1965 retirement, followed by his death in 1967.¹² He and his wife had one child, daughter Virginia Lee Bazile (1920-1972), who married Dr. John Edward Miller (1944). Her Estate donated the *Papers* to the Society.¹³

The deaths of the Judge (1967), his wife (1970) and daughter (1972), impeded location of relations or acquaintances. Many of his *Papers* were routine congratulatory letters to or from him for achievements, promotions or the like, revealing few personal qualities of writer or recipient. There were, however, exceptions. Between his religious "briefs" to his future bride (1916-1918),¹⁴ were his letters to her carefully analyzing prohibition influences on vote-getting.¹⁵ This would be significant in *Francisco*, where the defendant was prosecuted

¹¹(...continued)

1917, by an archivist]." *Bazile Papers*, Box 3 (underlining in original). Despite their mutual protestations, within six months they were married, with no evidence either had converted the other.

¹² Ibid, 4.

¹³ Ibid, 1, 6.

¹⁴ Already discussed, at n. 11, this **Chapter**, *supra* and accompanying text.

¹⁵ An example is, *Bazile Papers*, n. 10, this **Chapter**, *supra* (box 2, July 21, 1917, letter, Leon M. Bazile to Virginia Hamilton Bowcock, his future bride, providing in part:

The leaders – not the rank and file – of the Prohibition element are for the most part identified with the 'machine'. . . giving their support to Mr. Ellyson who is the candidate of that faction. Mr. Pollard having been a more staunch prohibitionor [sic] than Mr. Ellyson, these dry leaders have been

(continued...)

only for Sunday beer sales.¹⁶ Such a beer-only prosecution in *Francisco* may have been the Judge's suggestion, since testimony had him instructing a witness, before prosecution began, on how "to bring evidence in court."¹⁷

Other correspondence was more fruitful in assessing personal character. For example in 1941, while a judge, Leon Bazile wrote the U. S. Attorney General (**attached Exhibit "F"**¹⁸), accusing labor leader John L. Lewis of treason and demanding his indictment. On

¹⁵(...continued)

somewhat embarrassed as to how they should proceed. For some time Dr. Cannon has had his friends write letters to Mr. Pollard and the press suggesting that Mr. Pollard withdraw as the chance of two dry men beating one wet candidate was not very bright.

This showed Bazile's deep interest in "dry" and "wet" voting dynamics, presumably equally so in 1941, when prohibition sentiments were still important in Virginia politics. This importance was evidenced by prominent press coverage given the Methodist resolution praising the Judge's *Francisco* ruling banning Sunday sales on prohibition grounds. See n. 9, this **Chapter**, *supra*, and accompanying text.

¹⁶ "No complaint was lodged against him [Francisco] for the sale of articles other than beer." *Francisco v. Commonwealth*, 180 Va. at 374. So he was not prosecuted for the "cigarettes and tobacco, soft drinks and ice cream," *ibid*, 373-374, he also sold on Sunday.

¹⁷ **Ex "C"**, *Petition*, 38: "I was directed by the Honorable Judge and the Commonwealth's Attorney to bring evidence in Court." (Complaining witness Nichols.). The prosecutor spoke of Nichols discussing "with the Judge and me . . . what you could do to bring a prosecution . . .," 39, *ibid*.

¹⁸ **Exhibit "F"**, *Bazile Papers*, November 20, 1941 (n.10, this **Chapter**, *supra*, box 10, photo-reduced, handwritten copy on 8½ x 14-inch, lined paper, typescript attached for easier reading [**Exhibit "F-1"**, immediately after **Ex "F"**]). David M. Kennedy wrote: "John L. Lewis. . . demonstrated his continuing capacity for mischief in 1941 when he called his United Mine Workers out on a nationwide strike. . . . After a long, acrimonious standoff, amid mounting wintertime coal shortages and bitter denunciations of Lewis as a traitor and saboteur, the miners finally went back to work —on December 7, 1941." *Freedom from* (continued...)

Exhibit F's left margin, he wrote, "This was sent to the Attorney General of the United States . . . , but he did not have the courtesy to acknowledge it."

About fifteen years after *Francisco*, Judge Bazile achieved a kind of celebrity due to the Supreme Court's *Loving v Virginia* opinion,¹⁹ where an interracial married couple was charged in his court with violating Virginia's miscegenation laws. Upon their guilty plea, he sentenced them to a year in jail, suspended for 25 years on condition they leave Virginia for that 25-year period. Although the Virginia Supreme Court affirmed (with modifications not here relevant), the couple obtained review by the United States Supreme Court, challenging Virginia's miscegenation laws on equal-protection and due process grounds. In holding the laws unconstitutional, Chief Justice Warren quoted the "trial judge" as follows:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁰

Judge Bazile was not named by Chief Justice Warren, but was listed as the trial judge in the Virginia Supreme Court opinion for which U.S. Supreme Court review was granted, mean-

¹⁸(...continued)

Fear: The American People in Depression and War, 1929-1945, vol. 9, *The Oxford History of the United States*, C. Vann Woodward, gen. ed. (Oxford: Oxford Univ. Press, 1999), 639. Thus, without accepting or defending the Judge's 1941 view of Lewis as a traitor, his was far from an isolated opinion at the time.

¹⁹ 388 U.S. 1 (1967), *reversing, sub nom*, *Commonwealth v. Loving*, 206 Va. 924; 147 S.E. 2d 78 (1966).

²⁰ 388 U.S. at 3.

ing he was the “trial judge” whose opinion Justice Warren quoted in *Loving v Virginia*.²¹

(6) The Defense Counsel: George Haw and Andrew Ellis.

Little was discovered about defense counsel, except that one of Judge Basile’s former Virginia legislative colleagues, Albert G. Boschen, Delegate from Richmond, wrote him a December 28, 1941 letter stating, in part (**attached Exhibit “G”**):

While talking to the Governor, your name came up and I told him that he did one big act when he appointed you as Judge. He told me that he had splendid reports of your good work. I did not know that Geo Haw and Andrew Ellis opposed you but I understand it now.²²

Thus “Geo Haw and Andrew Ellis” purportedly “opposed” Bazile, ambiguously meaning either “opposed” his judicial appointment or “opposed” him in *Francisco*. Either interpretation suggests an antagonism between them which the trial, in some way, continued.²³

²¹ This is also confirmed (1) in 206 Va. at 924, listing Hon. Leon M. Bazile as trial judge (see n. 21, *ibid*); and (2) in **Record** [on appeal], *Commonwealth v. Loving*, No. 6163 (Richmond: Virginia Sp. Ct., filed November 4, 1965) (Univ. of Richmond Law Library duplicates official filings since 190 Va, including bound filings for 260 Va. pp. 899-944 [within which is *Loving’s Record*, containing the Judge’s **Opinion** at **Record**, 8-14, *supra*, identifying Bazile as author, with the passage quoted in the U.S. Supreme Court *Loving* Opinion, 388 U.S. at 3 [**Record**, 14, *ibid*]). *Loving* arose in Caroline County, not Hanover County where *Francisco* was tried. However, both counties are in Virginia’s Fifteenth Circuit Court, *Rules of the Supreme Court of Virginia* (2004) (Matthew Bender/ Lexus-Nexus), 29, as presumably was true in 1965 when *Loving* was decided, meaning the same judges presided in both counties.

²² Albert O. Boschen, Delegate, Virginia House of Delegates, December 28, 1941 letter to Hon. Leon M. Basile (emphasis added). *Bazile Papers*, **Exhibit “G”**.

²³ See n. 101, this **Chapter**, *infra*, and accompanying text, as an example of the antagonism.

(7) The Sheriff: Sumpter Priddy

Sumpter Priddy was Hanover County Sheriff during the *Francisco* trial. Although he has passed on, his son, identically named, though advanced in years, was very much alive and agreed to be interviewed about what his father told him about the *Francisco* prosecution. The son's answer to the first question posed about *Francisco* at the end of **Chapter 2** (i.e., Why Francisco was singled out for prosecution) is in **Attached Exhibit "H"**, undersigned's April 16, 2002, letter to him, based on information he supplied and countersigned to confirm its accuracy, providing in part:

You advised that your father had told you, . . . this case was brought . . . because a County Commissioner, Joseph Johnson . . . , from the Beaverdam area . . . had a daughter who operated a store similar to the one allegedly operated illegally by Mr. Francisco on a Sunday. The inference was . . . that Johnson hoped thereby that his daughter could gain a commercial advantage over Francisco, due to the latter's having been prosecuted in this case for operating his business on Sunday in violation of the . . . Closing Law²⁴

Of course the younger Priddy's confirming signature on **Exhibit "H"** proves, at most, his understanding, of what his father, the Sheriff, told him about *Francisco*. Further, Joseph Johnson's views are unknown, since neither he nor his relations or acquaintances could be located, cutting off the potentially quite different views of *Francisco* and his participation in them, that might have been thereby obtained.

What favors reliance on **Exhibit "H's"** story is that it appears to have been the

²⁴ **Exhibit "H"** (extract), in Appendix. Attached Exhibit "H" *errata*: Priddy's address is on "Goshen" not "Ocean" Road (phonetic error due to telephone transmission); Joseph Johnson was County "Supervisor" not "Commissioner." Finally, Mr. Priddy dated his signature "4/16/2001" rather than the correct "4/16/2002," see **Ex "H"**.

Sheriff's confidential and uncompelled disclosure to his son. Further, his story suggested he yielded to a County Supervisor's pressure. This also encourages reliance, in that a speaker's uncorroborated admission arguably unfavorable to himself, is more credible than, in contrast, an uncorroborated admission favorable to himself.

There also were several then-contemporary, though partial and indirect, corroborations of **Exhibit "H"**. One of these was on October 18, 1941, the day after trial, when the *Times-Dispatch* reported that Sheriff Priddy declared a closing law moratorium:²⁵

While no official announcement was made, Sheriff Sumpter Priddy said he did not plan to make any arrests for Sunder [sic, Sunday?] beer selling until the [*Francisco*] case is finally decided by the Virginia Supreme Court of Appeals. Judge Bazile and the Commonwealth's Attorney Simpkins indicated their approval of this procedure.²⁶

The Sheriff's announced intent to not enforce closing laws seems unusual. Imagine, for instance, if he had refused to make arrests consistent with local judicial rulings on robbery or murder until an appeals court approved. Public protests would have been expected. In any event, he cared not for this prosecution, either for reasons his son advised in undersigned's letter, **Exhibit "H"**, or those inferred from the transcript, **Exhibit "C"**.

Whatever the Sheriff's motives, the above-quoted *Times-Dispatch* October 18, 1941 article amounted to a challenge to the other officials named to oppose his abstention from

²⁵ The second corroboration was his trial testimony; see nn. 79-80, this **Chapter**, *infra*, and accompanying text.

²⁶ *Richmond Times-Dispatch*, October 18, 1941, "**Hanover Verdict Bans Sale of Sunday Beer As Blue Law Violation; Judge Bazile's Decision Based Upon 24-Year-Old Court Ruling**," 1, footnoted quotation in text is at continuation page 10.

closing law prosecutions. The Sheriff was refusing to enforce the closing law as the prosecutor had urged it was written and as the Judge had ruled it meant. This constituted unusual defiance his part. Yet the article closed stating that prosecutor and judge “indicat[ed] their approval . . . ,” acquiescing to his seeming defiance, also unusual.

The *Times-Dispatch* provocatively recycled the story the next day, October 19, 1941, as if daring the Judge and prosecutor to contest it:

Sheriff Priddy was quoted in yesterday’s *Times-Dispatch* as saying he did not plan to make any arrests for Sunday beer selling until the *Francisco* case is finally decided by the Virginia Supreme Court of Appeals, and it was considered probable that the sheriff’s promise had been taken by the licensees as an assurance that they can remain open. No licensee will be arrested for selling beer on Sunday unless some citizen swears out a warrant such as was done in the *Francisco* case[,] the sheriff explained.²⁷

The Sheriff, accordingly, had slightly modified his stand: He now would arrest licensees who were alleged closing-law violators only if a citizen “swears out a warrant.”²⁸ That is, he will not allow closing law prosecutions based on observations by deputies during regular duty, as he did concerning other law violations, unless *Francisco* is affirmed.

Thus, late Sheriff Priddy suggested to his son that he was pressured by Hanover County Supervisor Johnson to prosecute *Francisco* to competitively advantage Johnson’s daughter. Of the three complaining witnesses who made the *Francisco* Sunday beer purchases two met at Johnson’s to do so (picking up the third on the way), and two were John-

²⁷ *Times-Dispatch*, October 19, 1941, “Methodists Praise Ruling on Beer Ban,” 16.

²⁸ That is, the same way the *Francisco* prosecution was filed.

son's tenants.²⁹ These facts support viewing Johnson as *Francisco's* initiator, plus his attending the trial. Conversely, the Sheriff's reluctance to rely on *Francisco*, as reported by contemporary newspaper accounts, supported his son's recollections in **Exhibit "C"**, of his father's lukewarm view of the *Francisco* prosecution.

The trial transcript (**Exhibit "C"**), however, also allowed an inference that the *Francisco* prosecution was motivated by a variant of **Exhibit "H"** (undersigned's letter), as brought out by complaining witness William Nichols' testimony.³⁰

- Q. You operate a store yourself, don't you?
 A. We operate a grocery store.
 Q. About how far from Mr. Francisco?
 A. About three miles, around three miles to the west.
 Q. You are a competitor, are you?
 A. Sir?
 Q. You are a competitor?
 A. No, sir.
 Q. Not a competitor within three miles of him?
 A. My wife operates the store in her own name. I haven't anything to do with it.
 Q. Well, your wife is a competitor of Mr. Francisco's?
 A. No, sir, we don't consider it that way. That has been our home down there for about 26 years, a long time before he [Francisco] came to Hanover County.³¹

Nichols, despite denying his wife's being Francisco's "competitor," testified to facts showing the contrary: His wife solely owned a store only three miles from Francisco's. He

²⁹ On this point, however, see n. 57, this **Chapter**, *infra*, and accompanying text.

³⁰ The *Francisco* complaining witnesses were Charlie Williams, Conway Cauthorne and William J. Nichols, "Indictment for Misdemeanor," **Ex "C"**, *Petition*, 20.

³¹ *Ibid*, 40.

was a County “special officer”³² overseeing Sunday beer purchases at Francisco’s as a prelude to prosecution.³³ He was logically motivated to economically advantage his wife as a store owner not open on Sunday by collecting evidence for this prosecution against a competing store owner (Francisco) who was open and selling beer on Sunday.³⁴

The parallels, described above, of the **Exhibit “C”** transcript story with Sheriff Priddy’s account in **Exhibit “H”**, also expose differences: Both describe *Francisco* arising to benefit a competing female store owner. If she was Johnson’s daughter, however, as the Sheriff said, that would have been widely known and would have dominated the trial testimony, which it did not (there was no mention of any such relation); just as Johnson’s relation to this prosecution, in contrast, did dominate earlier-quoted, cross-examination.³⁵

Thus, two plausible and somewhat similar stories³⁶ emerge of *Francisco*’s origin, neither completely consistent with the other, and each with documentary support. Under such circumstances, eminent constitutional historians warn: “The German historian Leopold

³² Ibid, 36.

³³ Ibid, 38.

³⁴ Ibid, 36.

³⁵ See n. 6, this **Chapter**, supra, and accompanying text. Although Johnson was not County Supervisor during *Francisco* (see n.9, this **Chapter**, and accompanying text), he still may have had political influence, leading to his *Francisco* involvement before appointed Supervisor. It could well be that those recalling the trial, because of Johnson’s local prominence, incorrectly remembered his being a Supervisor before Francisco.

³⁶ The word “stories” here is not used to denigrate, nor to imply that “story” means fiction. “Story” here-means a coherent account based on reasonably reliable information.

von Ranke's exhortation . . . to determine 'wie es eigentlich gewesen' ('how it actually was') is noble and human, but at times futile."³⁷ Attempts here to learn "how it actually was" about *Francisco*'s origin may not quite be "futile," but they do present difficulties, with no clear basis to prefer one story over the other.

It seems reasonable, however, to consider common threads in both stories as the closest approximation of "how it actually was." Thus: both the transcript (Ex "C") and Sumpter Priddy's recollections (Ex "H") described Francisco's store competing with a female-owned store as causing the prosecution. Both stories also involved County Supervisor Joseph Johnson. His involvement could be, in Priddy's version (Ex "H"), because he was the female store owner's father; or because, in the transcript version (Ex "C"), as an important County political figure, he was consulted due to complaining witness Nichols, the female store owner's husband, seeking Francisco's prosecution.³⁸ Both versions have common themes of commercial competition as a prosecution motive and Johnson's importance in bringing that motive to fruition. This is probably as close as one can come, from the record here assembled, to the "real" reasons for the *Francisco* prosecution.

What is noteworthy about commercial-competition as *Francisco*'s supposed motivation, is not its novelty, but its frequency. Two of four landmark closing-law cases col-

³⁷ Henry J. Abraham & Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States*, 6th ed (New York: Oxford Univ. Press, 1994), 42.

³⁸ *Francisco* does not show Nichols speaking to Johnson, but Johnson certainly seemed involved, given the complainants were his tenants and his home was their rendezvous for the beer purchases (See nn. 6 - 7, this Chapter, *supra*, and accompanying text).

lectively reviewed by the United States Supreme Court in 1961, *Gallagher v Crown Kosher Super Market, Inc.*,³⁹ and *Two Guys from Harrison-Allentown, Inc. v McGinley*,⁴⁰ reflected commercial rivalry similar to *Francisco*,⁴¹ according to Sister Candida Lund's research.

In *Crown Kosher Super Market*,⁴² she found, a grocery chain, following its stockholders' religious convictions, closed its Springfield, Massachusetts, store at sundown Friday, reopening on Sunday, thus violating the state closing law. In *Crown*, Springfield police chief/plaintiff Gallagher, refused "reporters the names of those" seeking arrests of Crown's employees. "The answer . . . could be found in the small kosher butchers," who "wished to

³⁹ 366 U.S. 617 (1961).

⁴⁰ 366 U.S. 582 (1961).

⁴¹ The Supreme Court reviewed, besides *Crown Kosher* and *Two Guys from Harrison-Allentown*, the cases *Braunfeld v. Brown*, 366 U.S. 599 (1961) and *McGowan v. Maryland*, 366 U.S. 420 (1961). In all four the Court held Sunday closing laws enforceable for the secular purpose of affording workers a weekly rest day, regardless of religious persuasion, and thus did not offend US Const, amend. XIV. Justice Frankfurter wrote an encyclopedic concurring opinion in *McGowan*, 366 U.S. 420 at 459-581 (Frankfurter, J., concurring, joined by Harlan, J.) historically reviewing Sunday closing laws in Britain and the United States, citing *Francisco* as one of "the large majority" state court examples of considering closing laws as "having either an exclusively secular function or . . . accomodating both . . . civil and secular needs. . . .," *ibid* at 497, n. 82. Justice Frankfurter also reviewed closing laws in Roman times, and in England, *ibid* at 470-483, and English colonial times in Virginia, *ibid* at 484-486, 492-496, 549 (Part of Appendix I of his opinion) and then-current Virginia closing law provisions (part of Appendix II of his opinion).

⁴² Sister Candida Lund, "Religion and Commerce, The Sunday Closing Cases," *The Third Branch of Government: 8 Cases in Constitutional Politics, a Harcourt Casebook in Political Science*, C. Herman Pritchett & Alan F. Westin, ed. (New York: Harcourt, Brace & World, 1963), 277. Lund examined court records and briefs, interviewed police and counsel, and reviewed newspaper files, supported by an American Association of University Women fellowship, *ibid.* at 308, for material not in the appellate opinions.

work a five-day week but were disturbed by the competitive advantage that Crown Market had through . . . staying open on Sunday” She discovered they were the complainants against their *Crown* co-religionists.⁴³

The *Two Guys from Harrison-Allentown* closing law prosecution, Sister Lund discovered, was “[s]imilar to *Crown* in . . . economic motivation. . . .” Two Guys aggressively price-competed through “low rental, . . . large . . . parking lot, centralized warehousing . . . , computer inventory . . . , volume purchasing, low advertising, spare décor, . . . almost total absence of . . . service,” and doing Sunday business. The Hess department store chain threatened Sunday sales also, she said, but it became “apparent that Hess took this step to give [the] District Attorney . . . opportunity to act.” When he, in response, announced he would prosecute, Hess advertising made its sentiment clear: “Our Hats Are Off to District Attorney Paul McGinley for his Dynamic Action Against Sunday Selling.”⁴⁴

The Connecticut Court of Common Pleas similarly discovered patterns of private-citizen complaints initiating closing law prosecutions for commercial advantage. On this basis, it held its state’s closing law unconstitutional because, said the court, public prosecutors became “tools of the private interest of the complainants and thus prostitute the State’s law enforcement power to the service of selfish private goals.” This unfavorably and unconstitutionally contrasted, the court found, with Connecticut’s enforcing the rest of the criminal

⁴³ Ibid at 278-279.

⁴⁴ Ibid at 283-285.

code almost exclusively through police investigations and complainants.⁴⁵

(8) Summary of “*Dramatis Personae*.”

Closer examination of underlying facts provides a basis to conclude Mr. Francisco was prosecuted for business competition reasons: A nearby competing female store-owner store lost business to Francisco’s store because he operated on Sunday while she did not. She sought to disadvantage Francisco by having him prosecuted, with her husband, Nichols, as chief prosecution witness, the police officer in charge.

The prosecution may have originated because the store owner was the daughter of a politically powerful Hanover County personality, Joseph Johnson. Alternatively, it may simply be that Johnson, along with the Judge and prosecutor, all major county figures, were involved through a business-competitor’s seeking prosecution. The prosecution’s use of Johnson’s tenants as complaining witnesses, his home as a rendezvous for their travel, and his attendance at trial, all support his involvement. A limited sampling of closing law appeals before the United States Supreme Court and in Connecticut suggests such closing law motives were the norm, rather than the exception.

Judge Leon M. Bazile emerged as a principal *Francisco* figure. He had long Attorney

⁴⁵ Connecticut [(State of)] v. Anonymous (1976-7), 33 Conn. Supp. 56; 364 A. 2d 244, 246 (Common Pleas, 1976). The quotation in the footnoted paragraph is from the *dissent* in Playtogs Factory Outlet, Inc v. County of Orange, 57 App. Div. 772 ; 379 N.Y.S. 2d 859, 867 (1976), a New York closing law case, incorporated into Connecticut’s *Anonymous* (1976-7) as part of the court’s opinion. The Connecticut Supreme Court declared that *Anonymous* (1976-7), supra, forced the legislature to revise Connecticut’s closing law. Caldor’s Inc v Bedding Barn, Inc., 177 Conn. 304; 417 A. 2d 343, 346 (1979).

General's Office experience briefing closing law cases, some of which were pivotal in *Francisco*.⁴⁶ He gained political influence by his General Assembly service, presumably aiding in his judicial appointment.⁴⁷

The Judge's inclination to push his own strongly held views was evidenced early in his career by his vigorous "battles" to convert his fiancée to his Catholic faith.⁴⁸ In his midlife it was again suggested by his 1941 letter to the U.S. Attorney General demanding prosecution of labor leader John L. Lewis. Near the end of his life, his strongly-held racial attitudes caused implicit comment in a United States Supreme Court opinion. His personality, however, was illuminated most keenly by his marginal note on his 1941 draft letter to the U.S. Attorney General, complaining of the latter's lack of "*courtesy* to acknowledge it,"⁴⁹ revealing a pride of status which he strongly felt others should acknowledge.

The Judge's letters to his fiancée analyzing 1916-18 prohibition voting illustrated his political interest.⁵⁰ He plausibly saw opportunity to enhance his status with the prohibition movement, still powerful in 1941 Virginia, by encouraging the *Francisco* prosecution. His efforts to induce filing the case were confirmed by trial testimony. High local interest in

⁴⁶ See *Pirkey*, 134 Va. at 715; and *Lakeside*, 134 Va. at 699, where Leon Bazile's service as an Assistant Attorney General in each case was noted.

⁴⁷ This can be inferred from attached **Ex "G"**, Delegate Albert O. Boschen's letter.

⁴⁸ See n. 11, this **Chapter**, *supra*, and accompanying text.

⁴⁹ See n. 18, this **Chapter**, and accompanying text, *supra*, following that footnote.

⁵⁰ Example extracted in n. 15, this **Chapter**, *supra*.

prohibition was evidenced by Richmond papers first-page coverage of the Methodist Conference Resolution, commending the Judge's ruling against Sunday beer sales.

Some other persons turned out to be more important than might be expected:

- The *Francisco* defense counsels were apparent political opponents of the Judge. Comments from the Judge's former legislative colleague suggests that their prior conflicts, at least partly, accounted for their representing Mr. Francisco;
- Sheriff Sumpter Priddy effectively stopped the use of the Judge's *Francisco* closing law ruling. Richmond papers at first were replete with breathless intimations of *Francisco*'s larger significance in dramatically decreasing Sunday sales.⁵¹ The Sheriff halted such speculation, however, by deferring such prosecutions pending *Francisco*'s appeal. Press coverage of his decision was written so as to challenge the Judge and Commonwealth's attorney to oppose his prosecution moratorium, which they declined to do. Ultimately, of course, *Francisco*'s supposed wider enforcing of the closing law came to nothing with the Virginia Supreme Court's reversal of the trial verdict. The high court ruled that whether

⁵¹ Examples: (1) *Richmond Times-Dispatch*, October 18, 1941, front-page, by Overton Jones: "**Hanover Verdict Bans Sale of Sunday Beer As Blue Law Violation.** . . .," (a) "Every ABC licensee in . . . Virginia who sells beer on Sunday is guilty of violating the so-called Blue Law, according to a far-reaching verdict in a Hanover County Circuit Court case . . . ;" and (b) "[T]he ruling has almost unlimited ramifications since it would appear that hundreds of articles now sold on Sunday are sold in violation of the blue law [Emphasis in original]." (2) *Richmond News-Leader*, October 18, 1941, 1, coverage of Methodist Convention resolution commending the Judge's *Francisco* ruling, emphasizing the ruling's presumed effect on the entire state, 12: "**Bazile Will Hear Argument On Blue Law Beer Verdict;** Questions of the legality of Sunday sales of beer and wine, . . . in a case that may be State-wide in its decision [sic], is [sic] still undecided today, while indications point to an eventual ruling by the Virginia Court of Appeals. . . . [emphasis in original]."

Francisco's beer sales were "necessary" on Sunday, and thus exempt from a closing law prosecution, was the jury's decision, not the Judge's.⁵² Prior to the Virginia Supreme Court's year-later *Francisco's* decision reversing Judge Bazile's prohibition of Sunday beer sales, however, it was Sheriff Priddy's refusal to follow the Judge's ruling, as much as anything else, that drew from that ruling its sting of Sunday labor prohibition.

(c) More Detailed Examination of Witness Testimony.

In this **Chapter 9(c)**, testimony of various witnesses is further reviewed, to develop major themes herein.

(1) Witness William J. Nichols.

Nichols, the first prosecution witness, was a County "special officer" for closing law prosecutions.⁵³ After testifying he saw Francisco selling beer to the other complaining witnesses on Sunday, Nichols was asked "at whose direction" he went to Francisco's for "securing evidence." He answered he "was directed by the Honorable Judge [Bazile] and the Commonwealth's Attorney to bring evidence in Court."⁵⁴ Accordingly, the Judge, far from being a neutral adjudicator, was important in initiating the prosecution, and telling witness

⁵² See n. 13, **Chapter 2**, and supporting text, *supra*.

⁵³ Attached **Exhibit "C"**, *Petition*, 36.

⁵⁴ *Ibid*, 38. He reconfirmed this to the prosecutor: "Q. You had discussed, Mr. Nichols, . . . with the Judge and with me here what you could do to bring a prosecution, had you not? A. Yes, Sir." *Ibid*.

Nichols what evidence to obtain.⁵⁵

(2) Other Complaining Witnesses.

Complaining witness Williams testified that Nichols, as just discussed, drove him and Cauthorne to Francisco's store for the Sunday beer purchases.⁵⁶ Although his testimony differed slightly from Cauthorne and Nichols,⁵⁷ all versions showed the three traveling

⁵⁵ Conduct like the Judge's in *Francisco* is today proscribed in Virginia, *Rules of the Supreme Court of Virginia, Section III*, "Cannons of Judicial Conduct [effective 1999]," 3B(7), *Virginia Court Rules and Procedure - State* (n.p.: Thompson-West 2005), 221: "A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of [both] . . . parties concerning a pending or impending case . . ." (emphasis added) (With exceptions not here relevant). The Supreme Court *held*, concerning contempt prosecutions by state-court judges: "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of charges they prefer." In re Murchison, 349 U.S. 133, 137 (1955). Though *Murchison* was some years after *Francisco*, it cited an older cases on this point : Wisconsin *ex rel* Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172 (1897): Liquor license revocation by town board member who hired minor to make illegal purchase from licensee; *held* that seriousness of alleged offense "does not justify members of such board . . . prejudicing themselves by . . . procuring and abetting [its] commission . . . that they may pronounce judgment on the offender. . . ." Ibid. *Getchel* was followed by respected courts, such as in Wilcox v. Supreme Council of Royal Arcanum, 210 N.Y. 370, 104 N.E. 624, 627 (1914) (society directors who initiated vigorous public demands for society member's expulsion, *held*: disqualified from conducting expulsion hearing). Thus, there was authority for the Judge's removal at the time of *Francisco*. At that time, however, Virginia courts were extremely reluctant to recuse judges for such reasons. For example, in Ewing v. Haas, 132 Va. 215, 223, 111 S.E. 255 (1923), the judge supplied to one side only in a case over which he presided, legal authority and proposed written argument for that side's appellate brief. *Held*, that while this was "indiscrete, unwise and injudicious" it did not warrant removing the judge from a second case between the same parties. Therefore, it is unclear if removal could have been obtained in 1941 when *Francisco* was tried. No such motion was filed, nor the issue raised on appeal.

⁵⁶ Exhibit "C", 44.

⁵⁷ Williams recalled meeting Nichols and Cauthorne at Johnsons, see Ex "C", *Peti-*
(continued...)

together to Francisco's, with at least two of them meet-ing at Johnson's for that trip, with two of them Johnson's tenants. All versions also agree that they proceeded with the third witness (Williams) to Francisco's. These events and Johnson's attendance at trial, all suggested his involvement in *Francisco*.

(3) Other Merchant Witnesses.

Local merchant/restaurant-owners testified, for the defense,⁵⁸ that most of their customers ordering meals also ordered beer or wine; that merchants not primarily serving meals sold a great deal of beer and wine for off-site consumption; that Sundays were a major sales-day, economically vital; that tourist beer-purchases were substantial, and that no one arrested them for Sunday beer sales, even with police frequenting their businesses.⁵⁹ The *Times-Dispatch*, on October 18, 1941, reported "a number of ABC licensees who had sat through the trial began asking questions as to their right to sell beer this coming Sunday,"⁶⁰ one of whom shifted from courtroom spectator to defense witness.⁶¹

⁵⁷(...continued)

tion, see **Ex "C"**, 44. Nichols and Cawthorne, however, testified only the two of them met at Johnson's, then drove from there to pick up Williams. **Ex "C"**, 38, 49, whereupon all three traveled in Nichols' car to Francisco's for the beer purchases.

⁵⁸ **Exhibit "C"**, *Petition*, lists these witnesses as: I. Keeton, 52-59; Mrs. Mary K. Winn, 72-75; Robert Stone, 76-79; F. R. Baker, 80-82; and Frank Bradley, 82-85.

⁵⁹ Examples are in **Ex "C"**, *Petition*, 76-77 (testimony of Robert Stone); 80-81, *ibid*, (testimony of F.R. Baker).

⁶⁰ *Richmond Times-Dispatch*, October 18, 1941, 1, on continuation page 10.

⁶¹ See **Exhibit "C"**, *Petition*, 75, merchant/witness, Mrs. Mary Winn: "Q. [by (continued...)]

Presumably these witnesses were called to persuade the jury that Francisco was unfairly singled out for prosecution.⁶² Appellate opinions contemporary to *Francisco* made clear, however, that supposed closing law selective prosecutions (i.e., charging some with the offense, but not others) was not a defense.⁶³ Only later did some courts change this view.⁶⁴

(4) R. K. Turner, ABC Inspector.

R. K. Turner, inspector for the “Alcohol Beverage Control Board [ABC],” testified that of his “own knowledge, approximately 80 percent of the 61 [ABC licensees] in . . . [Hanover] County are selling [beer] on Sunday.”⁶⁵ This was presumably why the supreme court stated in *Francisco* that “at least eighty per cent of those licensed to sell beer . . . sold

⁶¹(...continued)

prosecutor] And you, of course, are down here . . . trying to save your Sunday business?/ A. No, sir, I didn’t have any idea that I would be called as a witness . . . I am operating that business, and I came here . . . as a spectator. I was asked if I would be a witness and I consented out there./Q. But you are interested in the outcome?/A. Of course I am interested in the outcome.”

⁶² Asking the Judge to rule for the defense on this ground was presumably viewed as futile, given testimony that he helped plan the prosecution (see n. 54, **Chapter 8**, *supra*, and accompanying text).

⁶³ *Arrigo v. Lincoln* [(City of)], 154 Neb. 537; 48 N.W. 2d 643, 648 (1950) (“To establish arbitrary discrimination . . . , there must be more than a showing that a law or ordinance has not been enforced against others . . . Abuse in its enforcement does not affect its validity [citations omitted].”) The *Francisco*’s Commonwealth appellate brief, **Exhibit “D”**, 3, also quoted a case so holding: *Gallen v. State*, 156 Md. 459, 144 Atl. 350, 353 (1929) (“[G]uilt or innocence . . . could not . . . depend upon . . . whether other parties had been guilty of similar acts without prosecution . . .”).

⁶⁴ See n. 45, this **Chapter**, and supporting text, *supra*, as an example.

⁶⁵ **Exhibit “C”**, *Petition*, 72.

it openly on Sundays.”⁶⁶ The inspector’s unrefuted testimony also seemed intended to portray Francisco as unfairly singled-out for prosecution. As already noted, this was insufficient according to legal authority of the time to excuse the defendant,⁶⁷ though some later cases saw things differently.⁶⁸

(5) The M. G. Franciscos, Husband and Wife.

The testimony of defendant M. G. Francisco and his wife about their Sunday beer sales was essentially undisputed.⁶⁹ For ten years they had lived near their store which was licensed to sell beer. Mr. Francisco made the Sunday beer sales to complaining witnesses Cauthorne and Williams, he said, along with chewing tobacco and Coca-Cola. He knew that complaining witness Nichols, a special officer, could see there was no disorder due to beer sales. Mrs. Francisco described helping at the store from the family’s nearby home where six of their eight children also lived.⁷⁰

Unexpected trial humor arose as Mr. Francisco, while describing Sunday beer sales interjected, “I have sold to a Judge on Sunday,” whereupon Judge Bazile expostulated, on

⁶⁶ *Francisco v Commonwealth*, 180 Va. at 374.

⁶⁷ See n. 63, this **Chapter**, and supporting text, *supra*.

⁶⁸ See n. 45, this **Chapter**, and supporting text, *supra*.

⁶⁹ Their transcribed testimony is in **Ex “C”**, *Petition*, the defendant’s at 60-67, 69-71 and 79, *ibid*; his wife’s at 67-69, *ibid*, summarized in paragraph containing this footnote.

⁷⁰ **Exhibit “C”**, *Petition*, 68. The oldest Francisco children were out of the home, a 22 year old son in Florida, and an 18 year old daughter in school. The only son at home was aged 14. *Ibid*. This, presumably, was T. Waddy Francisco, interviewed via telephone by undersigned in February 2002; see n. 5, this **Chapter**, *supra*, and accompanying text.

the record, “Not this one.”⁷¹ This was reported in both papers, the *News-Leader* noting the Judge’s response was “to the amusement of the courtroom spectators.”⁷²

(6) C. W. Taylor, Clerk, Hanover County Board of Supervisors.

The *Times-Dispatch*’s Overton Jones gave the clearest account of why *Francisco* defense counsel Andrew Ellis sought documentary evidence from the Board of Supervisors, through testimony from the Board’s clerk, C. W. Taylor:

Mr. Ellis sought to bring before the jury . . . that on July 1 . . . [1941] the . . . Board of Supervisors refused to . . . ban . . . Sunday sale of beer . . . , as an additional indication that the . . . people of Hanover County considered beer selling a necessity. Mr. Simpkins [prosecutor] maintained that the board’s action had no bearing . . . ; and Judge Bazile upheld that view and refused to allow [it] . . . before the jury. However, in the absence of the jurors, the defense inserted in the . . . record a statement of the supervisor’s action⁷³

In *Francisco*, the defense argued that the Board of Supervisors’ rejection of requests to prohibit Sunday alcoholic beverage sales amounted to its agreeing there was an economic “necessity” for such sales, entitling the defendant to seek jury acquittal on that ground. Judge

⁷¹ Ex “C”, *Petition*, 70.

⁷² *News-Leader*, October 18, 1941, “Bazile Will Hear Argument in Blue Law Beer Verdict,” 12. The *Times-Dispatch*, October 18, 1941, 10, also reported this interchange. The Judge was concerned to clarify that this did not refer to him. (“The Court: Just a minute. I do not mean to reflect on Mr. Francisco at all, but I do not think I have ever been to his place. . . . Q. [By Judge to Francisco] You didn’t mean that this Judge [speaking of himself] — You don’t mean this Judge—? A. [by M.J. Francisco] No, I certainly did not. It was a different Judge. But I have sold to a Circuit Judge.” Ex “C”, *Petition*, 70-71.) This shows the Judge’s concern to have nothing he regarded as improper attached to his name.

⁷³ *Richmond Times Dispatch*, October 18, 1941 [day after trial], *supra*, 1. The footnoted quotation from the article is from its page 10 continuation.

Bazile denied admission of the Board's records of its action on that subject in July 1941, produced by its clerk under subpoena.⁷⁴ As occurred in *Lakeside*, however, he allowed the Defendant to preserve evidence on a separate record apart from the jury, for appellate review if a conviction occurred.⁷⁵ Defendants' use, in closing law cases, of such sophisticated evidence techniques, partly helped explain closing-law defense victories in *Lakeside* and, as will be seen, in *Francisco* as well. In both cases, relatively unique "necessity" claims were advanced, and were more persuasively expounded on appeal through transcribed testimony.⁷⁶

The Judge's questions from the bench elicited from the witness, Board Clerk C.W. Taylor (referencing Supervisors' meeting records to answer), that (1) There were about 75 spectators at the Board meeting considering banning Sunday beer-sales; (2) A majority of those attending (apparently beer-selling merchants) opposed a sale ban; but (3) That the written petitions the Board received contained about a thousand signatures favoring a ban.⁷⁷

⁷⁴ **Exhibit "C", *Petition*, 86.** The Judge ruled immediately thereafter that the records in question were to be "put in the record," *ibid*, of the trial, for the appeal.

⁷⁵ See nn. 75-77, **Chapter 7**, and accompanying text, *supra*, discussing use of this technique in *Lakeside* (part of **Chapter 7(b)(3)**, *supra*).

⁷⁶ In theory, prosecutors also could do this, but not much would usually be gained, since prosecutorial retrials mostly would be barred on double-jeopardy grounds.

⁷⁷ **Exhibit "C", *Petition*, 88.** Defense counsel asserted these 1,000 signatures were "[o]ut of twenty-five thousand," *ibid*, presumably meaning out of a Hanover County population of 25,000. However, the 1940 federal County census was only 18,500. *Virginia Statistical Abstract (2000)* (Charlottesville: Weldon Cooper Center for Public Service, Univ. of Virginia, 1999), Table 16.6C, "Decennial Census Counts for Virginia's Counties and Cities: 1790 - 1990," 647. If half the population was under 21, those wanting to ban Sunday beer sales impressively obtained supporting signatures of over 10% of Hanover County adults.

The Judge's questioning suggested he was aware, in advance, of the answers he was eliciting. This would be consistent, as earlier discussed, with his interest in analyzing the politics of prohibition issues.⁷⁸

(7) The Sheriff: Sumpter Priddy.

The Sheriff testified he saw complaining witnesses Williams and Cauthorne purchasing beer from Francisco on a Sunday, but could not recall the date, though he was at Francisco's "on quite a number of Sundays." He was the last witness.⁷⁹

The Sheriff's testimony was unenthusiastic about the prosecution. His testifying for the defense was odd as a matter of form. As a law enforcement officer, a Sheriff typically testified for the prosecution and not, as here, for the defense. This was followed by a prosecution cross-examination of him with incredulity almost approaching disdain.⁸⁰

⁷⁸ See n. 15, this **Chapter**, and accompanying text, *supra*.

⁷⁹ Sheriff Priddy's testimony, **Ex. "C"**, *Petition*, 89-91, the quoted phrase at 89.

⁸⁰ Extract of prosecutor's cross-examination of Sheriff: "Q. How did you happen to be visiting Mr. Francisco on two occasions on that Sunday? A. I went . . . in Louisa County, just over the line, . . . and when I came back I stopped by Mr. Francisco's. Q. You stopped on the way up? A. I didn't stop on the way up.? Q. You said you visited him on two occasions? A. I said I slowed up when I went by; I didn't stop. Q. You didn't stop, but you stopped when you came back? A. I stopped when I came back. Q. You just stopped in there as you would . . . any other place? A. Yes, sir. Q. Didn't stop for any purpose other than to buy the Coca-Cola? A. Well, I was riding around . . . the County. I stop any time . . . to see if everything is quiet, and no drunks riding around. Q. Then you did stop under your duties as Sheriff to see if everything was orderly? A. Well, I do most everywhere . . . in line of duty. Q Had you had any request by anyone to stop there? A. No, sir. Q. Or to observe that place for orderliness or disorderliness on Sundays? A. No, sir. Q. Had one at all from anyone? A. No, sir. [ending trial testimony]" **Exhibit "C"**, *Petition*, 90-91 (emphasis added). This was (continued...)

The Sheriff's professed non-recall of the "exact date" of the Sunday beer purchases bordered on the disingenuous.⁸¹ As an experienced law enforcement officer, he would know that if he could not testify to the purchase's "exact date," he was not supporting the state's criminal charge. This was because the indictment specified a date, Sunday, September 7, 1941, when the unlawful Sunday "labor" of beer-selling occurred. He admitted his presence at Francisco's when the complaining witnesses purchased the beer, but did not give the date. He easily could have refreshed his recollection before testifying merely by asking the date of purchase from any complaining witness. Since he had observed the purchases, in this way he also could have testified as to its date. Yet his testimony suggested (but did not expressly state), that he could not do so.

The Sheriff's withdrawn manner and ineffectual testimony, however, were consistent with his unwilling involvement in a prosecution initiated merely to commercially advantage a local merchant, as can be inferred from his son's recollections in **Exhibit "H"**. This also agreed with the Sheriff's public stance of not relying on *Francisco* for other closing-law

⁸⁰(...continued)

not a particularly "friendly" prosecutorial cross examination of the Sheriff. It also showed the Sheriff was not advised in advance on the plans for the September 7, 1941 *Francisco* prosecution beer purchases. Nichols' testimony showed, to the contrary, that the prosecutor and Judge were informed, and discussed with him what to do "to bring a prosecution" and "bring evidence to Court" in *Francisco*, *ibid* at 38-40.

⁸¹ The sheriff testified, answering defense counsel's questions: "Q. Did you have occasion to be in Mr. Francisco's store or filling station on Sunday, September 7, 1941? A. I don't remember the exact date, but I was there on quite a number of Sundays. Q. Do you recall seeing Mr. Cauthorne or Mr. Williams come in and purchase a bottle of beer on any Sunday that you were there? A. Yes, sir." **Ex "C"**, *Petition*, 90 (emphasis added).

prosecutions unless affirmed by Virginia's high court.

(d) The Judge's *Francisco* Closing Law Ruling.

This **Chapter 9(d)** contrasts Judge Bazile's *Francisco* Sunday beer-sale ruling reported in the press, with what the trial record shows the Judge actually ordered. What is learned is that the most newsworthy aspects of this ruling did not appear in the trial transcript. The jury, first of all, only knew of the Judge's instructions to them:⁸²

Note [by court reporter]: At this point the Court read to the jury Instruction No. 1

[INSTRUCTION NO. 1]⁸³

[The Court instructs the jury that if they believe from the evidence . . . beyond a reasonable doubt that the accused M. G. Francisco did keep open . . . on Sunday the 7th of September in Hanover County a business for the sale of beer and did on said Sunday sell beer, they should find him guilty and fix his punishment at a fine of not less than five dollars.]

Note [by court reporter]: Following a discussion with counsel, the Court addressed the jury as follows:

The Court: Now, if you believe . . . beyond a reasonable doubt that he [defendant M. G. Francisco] sold beer on Sunday, then you must find him guilty, and five dollars will be a sufficient fine⁸⁴

⁸² Although referred-to as the "Judge's" instructions, they were actually proposed by Commonwealth's Attorney Simpkins and approved by the Judge.

⁸³ This Instruction No. 1 [in brackets] is set forth in the text, exactly as the court reporter's "Note," quoted above the instruction, says the jury actually heard it at trial.

⁸⁴ **Attached Ex "C", *Petition*, 92**

Mr. Francisco, the defendant, never disputed the Sunday beer sales, but claimed a prosecution exemption due to the closing law's "necessity" exception. The Judge's instructions, however, cut off that "necessity" defense. Thus, as *Francisco* stated, "a verdict of guilty necessarily followed,"⁸⁵ because eliminating the "necessity" issue left nothing to decide. The jury's deliberations were, accordingly, virtually non-existent, as the court reporter described: "After staying out five minutes the jury knocks" and announced its verdict that: "'We, the jury, find the accused guilty . . . and fix his punishment at a fine of \$5.00.'"⁸⁶

Following in the transcript (**Ex "C"**) after the just-quoted instructions, were defense-requested instructions the Judge refused.⁸⁷ They all expressly or impliedly assumed a "necessity" defense, absent from the Judge's instructions. Nevertheless, nowhere in the transcript,⁸⁸ was there any ruling by the Judge "that sale of beer on Sunday violates Virginia's blue laws," as the *News-Leader*, for example, claimed he decided.⁸⁹

⁸⁵ *Francisco*, 180 Va. at 174 (emphasis added).

⁸⁶ **Exhibit "C"**, *Petition*, 93. The Judge eliminated the fine's amount as an issue by by instructing "\$5.00 will be a sufficient fine," *ibid* (maximum was \$500, see, 92, *ibid*).

⁸⁷ **Attached Ex "C"**, *Petition*, 94-97.

⁸⁸ The Judge certified in **Ex. "C"**, *Petition*, 97, that the transcript "is a true and correct stenographic copy . . . of all the testimony and evidence . . . including all of the instructions requested, given, and refused and objections and exceptions . . . [a]s well as all questions raised,[and] rulings thereon . . . in the trial" *Ibid*, 98.

⁸⁹ Quotation in footnoted sentence is from part of the following in the October 18, 1941 *News-Leader*, 1: "The Virginia Methodist Conference . . . adopted a resolution hailing 'with joy' Judge Bazile's decision that sale of beer on Sunday violates Virginia's blue laws." There also was nothing in the transcript, resembling a similar first sentence in *Times-*
(continued...)

The Judge's instructions to the *Francisco* jury earlier quoted herein, stated that in this particular case, if the jury believed "Francisco did keep open . . . on Sunday the 7th of September in Hanover County a business for the sale of beer and did on said Sunday sell beer, they should find him guilty."⁹⁰ Further, the Judge, as already discussed, refused instructions permitting the jurors to acquit the defendant on "necessity" grounds."⁹¹ Thus, the jury never heard, in the recorded trial transcript, anything concerning exempting defendant's beer sales as a closing law "necessity." That the Judge's *Francisco* jury instructions lacked any reference to the closing law "necessity" exception, however, did not also mean, under then-controlling case law, that the "necessity" exemption, due to the Judge's ruling, was barred in every Sunday sale in the state. This approach was expressly rejected in the Virginia Supreme Court's 1922 *Pirkey* opinion.⁹²

The Judge well knew this because, in 1922, he had been an Assistant Attorney General briefing that court in *Pirkey*, and included *Pirkey's* holding on this point in his *Francisco*

⁸⁹(...continued)

Dispatch, October 18, 1941, 1: "**Hanover Verdict Bans Sale of Sunday Beer as Blue Law Violation:** Every ABC licensee in the State of Virginia who sells beer on Sunday is guilty of violating the so-called Blue Law, according to a far-reaching verdict in a Hanover County Circuit Court case yesterday."

⁹⁰ See n. 83, this **Chapter**, and accompanying text.

⁹¹ See n. 85, this **Chapter**, *supra*.

⁹² See nn. 55-60 **Chapter 7**, *supra*, and supporting text, *supra*, discussing this point.

“Opinion of the Court.”⁹³ *Pirkey* recognized alternatives could arise of either so much evidence that no reasonable juror could doubt the “necessity,” thereby excepting prosecution under the exemption; or so little evidence that no reasonable juror could conclude “necessity” existed. Either alternative precluded submitting the issue to a jury.⁹⁴ However, if the “necessity” evidence was between these two extremes, *Pirkey* held, a defendant was entitled to a jury decision.⁹⁵

The first evidence in the appellate record of the trial Judge, Leon Bazile, ruling at trial level, to unequivocally bar Sunday liquor sales, denying defendants any recourse to the closing law “necessity” exception, was when his “Opinion of the Court” stated in part:

[H]ow can it be said that the sale of beer on Sunday is a work of necessity or capable of being made such? The vendor of beer cannot show that its sale on Sunday is necessary to save himself from serious or unexpected loss or that its sale on Sunday is necessary to save the public from unusual discomfort or inconvenience.⁹⁶

This accords with the Judge’s supposed ruling during the *Francisco* trial, as the *Times-*

⁹³ Leon Bazile was listed as an Assistant Attorney General briefing in *Pirkey*, 134 Va. 713, 715 and *Lakeside*, 134 Va. 696, 699. For Judge recognizing *Pirkey* and *Lakeside* did not hold that Sunday sales *always* barred by the closing law, see his “Opinion of the Court,” **Exhibit “C”**, *Petition*, 28: “The decisions in *Pirkey* . . . [and] *Lakeside*. . . involved acts about which fair-minded men might reasonably differ as to whether . . . [it, sic] was a work of necessity [emphasis added].” (Judge held *Pirkey* and *Lakeside* not controlling, because not specifically permitting Sunday beverage sales).

⁹⁴ See n. 60, **Chapter 7**, *supra*, where this rule from *Pirkey* is quoted. The Judge also quoted it in his later, January 19, 1942, “Opinion of the Court” in *Francisco*. **Exhibit “C”**, *Petition*, 24 and 28 (date of *Opinion* at 34, *ibid*).

⁹⁵ *Ibid*.

⁹⁶ **Exhibit “C”**, *Petition*, “Opinion of the Court,” 27.

Dispatch and *News-Leader* both reported on the day following the trial. The “Opinion” from which it was quoted, however, was dated January 14, 1942, almost four months later.⁹⁷ Thus, it was not available at the time of the *Francisco* jury verdict on October 17, 1941, nor the day after, when the Richmond papers first-claimed the Judge so-ruled,⁹⁸ so they could not have based their reporting on it.

Even though *Francisco* attorney arguments were not transcribed, all the Judge’s rulings following those arguments were in the transcript.⁹⁹ None of them declared the Virginia Sunday closing law barred Sunday beer sales without exception, as a reference to the attached transcript (**Exhibit “C”**) will show. The only other source of information for the press about the judge’s rulings would be statements by lawyers or the Judge during arguments before the court. The most lengthy of these arguments was over jury instructions, commencing immediately after testimony of the last witness (Sheriff Sumpter Priddy) was concluded.¹⁰⁰ The news reports revealed that the interchanges between defense counsels and court at times became heated.¹⁰¹ Nevertheless, it is plausible that during these arguments the Judge

⁹⁷ Ibid, 34. The *Opinion* is at 22-34 of *Petition*, **Exhibit “C”**.

⁹⁸ See n. 89, this **Chapter**, *supra*.

⁹⁹ See n. 88, this **Chapter**, *supra*, quoting the Judge’s certification in the appeal papers that all his rulings in *Francisco* were set forth in the trial transcript.

¹⁰⁰ **Exhibit “C”**, *Petition*, 91, shows the conclusion of Sumpter Priddy’s testimony and the court reporter’s characteristic notation “Here followed extended argument on instructions.” showing the commencement of jury-instruction argument.

¹⁰¹ For example, the *News-Leader* reported defense attorney Ellis saying that when
(continued...)

asserted, as reported by *Times-Dispatch* writer Overton Jones, “that beer selling on Sunday is a violation of Section 4570 of the Virginia Code, known as the Blue Law, . . . based on a 24-year-old ruling . . . in . . . *Ellis vs. the Town of Covington*.” That being said, it is critical to reassert here that nowhere in the October 17, 1941, trial transcript did Judge Bazile unequivocally announce such a rule. This was not accomplished in the trial record until the Judge filed his January 14, 1942 “Opinion of the Court” announcing such a rule, nearly three months after the trial ended.

It is hard to believe that the Richmond newspaper reporters and their editors, and legal counsel presumably advising them, were unaware that their October 18 and 19, 1941, articles describing the Judge’s ruling did not match the trial record. One can only speculate that the Judge either gave the reporters private assurances of his later issuing a written opinion, as he ultimately did; or that they were sufficiently certain, without his express promises, that he would do so. For either reason, their articles treated his formal opinion as completed, even though the Judge only published it months later, and even though this conditionally-future nature of the Judge’s ruling banning Sunday beer sales was not revealed in the Richmond papers’ press-reports of the *Francisco* trial.

¹⁰¹(...continued)

Ellis v Covington (at n. 17, **Chapter 7**, *supra*) was decided, “Virginia was under the sway and rule of religious fanatics and bigots,” to which Judge Bazile volunteered, “racketeers and crooks as well . . . ,” *News-Leader*, October 18, 1941, 12 (not in trial transcript, **Exhibit “C”**, *Petition*, because it was part of untranscribed attorney argument).

(e) **Judge Bazile's January 19, 1942, "Opinion of the Court" and its Treatment by the Virginia Supreme Court.**

Judge Bazile's January 19, 1942, "Opinion of the Court," occupied twelve printed pages of the appellate record.¹⁰² Reflecting extensive research, it was the centerpiece for his view, shared with many Virginians of prohibitionist or conservative-religious outlook, that the Virginia closing law absolutely prohibited Sunday beer sales, including M. G. Francisco's beer sales on Sunday, September 7, 1941.¹⁰³

The delay in the Judge's writing the opinion until almost four months after the jury verdict appeared due to the defense motion at the end of the trial to set aside the jury verdict, on which the Judge ruled argument would be held later.¹⁰⁴ Presumably this generated motions and arguments for some time after the trial, after which the Judge issued his January 19, 1942, "Opinion of the Court," and denying defendant's motion to set aside the jury verdict on March 16, 1942.¹⁰⁵ Additional argument presumably occurred after that ruling, since the May, 1942 "Hanover County Criminal Docket," still listed *Francisco* as "pending on

¹⁰² **Exhibit "C",** *Petition*, 22-34.

¹⁰³ The intensity of prohibitionist views was suggested by accounts of the October 18, 1941 Methodist Conference, whose resolution praised the Judge's supposed (but non-existent) "ruling" barring Sunday beer sales at the previous day's *Francisco* trial. One report, for instance, stated the Conference "adopted a resolution approving the decision of Judge Leon Bazile against the sale of beer and volleyed 'amens' last night as it heard a report calling upon church people to 'make America as dry as the Sahara Desert.'" *Times-Dispatch*, 1, October 19, 1941, "Methodist Praise Ruling on Beer Ban."

¹⁰⁴ **Exhibit "C",** *Petition*, 94.

¹⁰⁵ *Ibid*, 21.

motion.”¹⁰⁶ The last circuit court docket date was July 29, 1942.¹⁰⁷ The defendant’s appeal was filed on September 16, 1942.¹⁰⁸

The Judge’s January 11, 1942 “Opinion of the Court” was the fulcrum of the opposition to defendant Francisco’s appeal, buttressed by two propositions. First, as to the banning of Francisco’s Sunday beer-sales, the Judge relied on *Ellis v. Covington*,¹⁰⁹ which had declared the defendant in that case “plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability”¹¹⁰ Asserting *Ellis* decreed unqualified opposition against Sunday sales, the Judge characterized the above-quoted *Ellis* ruling as “a definite holding by the highest Court of the Commonwealth that the selling on Sunday of soft drinks pursuant to one’s regular business is a violation of the Sunday law.” This meant, the Judge reasoned that, in so many words, no “necessity” exception applied in *Francisco*,¹¹¹ because he considered beer sales, for purposes of the

¹⁰⁶ “Hanover County Criminal Docket, May 1942,” Hanover County Circuit Court Clerk’s Office, *Commonwealth v. Francisco* files. (One of the handful of documents concerning *Francisco* remaining in the county clerk’s office. See n. 2, **Chapter 8**, *supra*, and accompanying text.) **Attached as Exhibit “I”**.

¹⁰⁷ **Exhibit “C” Petition**, 19, grant of writ of error (for appeal).

¹⁰⁸ *Ibid*, cover sheet (rear).

¹⁰⁹ 122 Va.821, 94 S.E. 154 (1917); discussed at n.17, **Chapter 7**, *supra* and accompanying text.

¹¹⁰ **Exhibit “C”, Petition**, “Opinion,” 25, quoting *Ellis*, 122 Va. at 825.

¹¹¹ **Exhibit “C”, Petition**, “Opinion,” 25.

closing law, a “similar act” to the soft drink sales in *Ellis*.¹¹²

The Virginia Supreme Court, however, dismissed *Ellis* as superficial:

[B]ecause the conduct of such a business was held, as a matter of law, not to be a work of necessity . . . in *Ellis* . . . in 1917, it does not necessarily follow that such a business is to be outlawed in every community in the State, regardless of the . . . present day mode, habits and demands of a particular community. To adhere to that view is to shut our eyes to the known fact that the habits, customs, demands and necessities of the people, in some if not all the communities throughout the State, have undergone a change in the past twenty five years.¹¹³

Francisco’s formulation here almost parallels Frederick Lewis Allen’s description of post-World War I American social change.¹¹⁴ It mandated a substantial broadening of the closing law “necessity” exception and threw on the scrapheap holdings like *Ellis* and *Hanger*, due to what the supreme court saw as the “change in the past twenty five years” of the “habits, customs, demands and necessities of the people.” A prosecutor seeking to enforce the closing law under *Francisco*, faced complex arguments that the Sunday labors prosecuted could be exempted by a jury as a “necessity” due to “change” in “some if not all the communities throughout the state.” The Supreme Court had given fair notice that it could find many activities, under this reasoning, exempt from the Sunday closing law. The first supreme court

¹¹² Ibid, 26. The supreme court agreed with part of the Judge’s analysis: “We agree with the trial court that, in so far as the Sunday law is concerned, the sale of beer cannot be distinguished in principle from the sale of soft drinks, cigarettes or tobacco.” 180 Va. at 380.

¹¹³ *Francisco*, 180 Va. at 376 and 380.

¹¹⁴ See n. 20, **Chapter 7**, *supra*, and accompanying text,

flexing of its procedural muscle to do just that was *Francisco* itself.

The second underpinning to Judge Bazile's opinion concerned the Hanover County Board of Supervisors not barring Sunday beer sales. This, the defense unsuccessfully argued at trial, required a jury-determination of whether defendant should be acquitted for the Sunday beer-sales due to the closing law's "necessity" exemption. A statute provided that the county board of supervisors had "authority to . . . prohibit . . . sale of beer and wine . . . between . . . each Saturday and . . . Monday," and that "no provision herein . . . shall . . . alter[] . . . or repeal[] Section [4570] . . . of the Code of Virginia."¹¹⁵

The Judge's opinion focused on the last sentence of the above quotation: "[T]he General Assembly must have concluded that section 4570 . . . prohibited the sale of wine and beer on Sunday and that it was, by Chapter 129 of the Acts of 1938 merely giving to the localities the authority, by ordinance, to parallel the existing State law"¹¹⁶ Thus, he asserted the above referenced closing law statute (Section 4570) barred Sunday labor. Beer sales, he correspondingly claimed, could not qualify for the "necessity" exception. Further, the Judge reasoned, the Board of Supervisors' right to control beer sales on Sunday, granted by the 1938 enabling Act, was expressly subject to the statutory closing law. Thus, the Judge's concluded, the Supervisors could not permit Sunday beer and wine sales, because

¹¹⁵ Virginia Acts of 1938, p. 194, quoted in **Exhibit "C"**, Defendant's *Petition*, 12, further described in the Judge's Opinion as Chapter 129 of the Acts of 1938; *ibid* at 29.

¹¹⁶ **Exhibit "D"**, *Petition*, "Opinion of the Court," 32. Section 4570 is, of course, the Virginia Sunday closing law itself, incorporated by reference into the enabling act, the latter act allowing the Board of Supervisors to ban Sunday beer sales.

that conflicted with the closing law's prohibition of doing Sunday business.

The reason the *Francisco* opinion reversed the Judge was most clearly explained by "Mr. Dooley," a mythical Irish-American saloon-keeper (created by syndicated columnist Finley Peter Dunne a century ago), who "commented on politics and society in a rich Irish brogue."¹¹⁷ As "Mr. Dooley" was described as commenting: "A law . . . that might look like look like a wall to you or me wud look like a triumphal arch to th' expeeryenced eye iv a lawyer."¹¹⁸ In "Mr. Dooley's" terms, Judge Bazile saw the statutory closing law's incorporation into the 1938 Act enabling the Board of Supervisors to ban beer sales as a "wall," barring such Sunday sales. To the contrary, the supreme court held, the closing law actually contained what Mr. Dooley called the "triumphal arch": its "necessity" exception, allowing the jury to bar its enforcement. The court explained:

[T]he legislature . . . did not intend that the sale of beer on Sunday should be prohibited,[as] . . . shown by . . . authoriz[ing] . . . localities to fix the hours between . . . Saturday and . . . Monday [when] . . . beer and wine . . . might be sold [and a] . . . proviso that no such local ordinance shall be construed as . . . altering, amending or repealing Code, section 4570 [the closing law]. This . . . indicates that the legislature was fully aware that the sale of beer on Sunday might or might not be a violation of . . . section 4570, depending on the circumstances . . . in each locality, under . . . Pirkey Bros. . . . and later cases. Hence, the . . . enabling act was not to validate the sale of beer on Sunday in a community or locality where it was not a work of necessity

¹¹⁷ S.V., "Finley Peter Dunne" (1867-1936), *Encyclopaedia Britannica*, 4:277 (15th ed., 1974-1994): Early syndicated columnist, creator of "Mr. Dooley," whose "witty penetration of shams and hypocrisies" became "a force for clear thinking and tolerance. . . ."

¹¹⁸ *Oxford Dictionary of Quotations*, Elizabeth Knowles, ed., 5th ed. (Oxford Univ. Press 1999), 285:14 [quoting from "Mr. Dooley and the Power of the Press," *American Magazine*, 62:607, 607 (1906)].

within the meaning of the Sunday law. [¶] [I]f the sale of beer on Sunday was unlawful . . . , [w]hy the necessity of regulating such sale if it be prohibited?
¹¹⁹

Based on the above analysis, the *Francisco* opinion laid out a new form of jury instruction, overturning Mr. Francisco's jury-conviction:

In view of what we have said [the contested] . . . instruction should be modified to read as follows:

The court instructs the jury that if they find . . . the keeping open by the defendant of his place of business on Sunday, and the sale therein of beer . . . was reasonably essential to the economic, social or moral welfare of the community, . . . then they may find that such work was necessary within the meaning of the [closing law] statute, and if they so find, they should find the defendant not guilty.

Thus, incorporating the closing law statute into the 1938 enabling act, allowing counties to bar Sunday beer sales, which Judge Bazile concluded prohibited sales on Sunday, the supreme court said showed exactly the opposite. It proved, said the high court, that the legislature allowed local communities to decide that issue themselves. They could, according to the portion of *Francisco* above quoted, determine there was no "necessity" for beer sales at certain times on Sunday, by expressly prohibiting sales at those times. In any event, concluded the supreme court, had the legislature intended the closing law to absolutely bar local allowance of Sunday beer sales without exception, it would not have enacted the 1938 enabling act amendment, which provided for the opposite.

It should be noted in passing that what appeared to be the most persuasive argument

¹¹⁹ *Francisco*, 180 Va. 371, 381, 382 (including further indented quotation from opinion later on this page).

against the defense contention that the Board of Supervisors records should be considered by the jury, was made spontaneously by the Commonwealth's Attorney at trial:

Mr. Simpkins: Now, the Commonwealth desires to object . . . that the record of the Board of Supervisors . . . does not show any action at all by the Board. It merely shows a motion and failure of a second, which could show no action or failure to act on anything . . . before the Board¹²⁰

This was precisely, as noted earlier herein when discussing the Virginia Supreme Court's *Crook* case,¹²¹ what Abraham Lincoln raised in his Cooper Union speech. Lincoln cautioned that it is usually difficult to discern any intent from a legislative failure to act, as opposed to legislative action. *Francisco's* appellate briefing, however, was by the Attorney General's office (not the local Commonwealth's Attorney), which did not reassert that argument.¹²² As a matter of sheer logic, however, Mr. Simpkins' above-quoted argument at trial made eminent sense. The failure of the Board of Supervisors to take any action or make any statement about Sunday beer sales, due to lack of a seconding of a motion to do so, could well be argued to amount to no action by the Board at all.

The *Francisco* supreme court opinion thus went out of its way to refute every point of Judge Bazile's "Opinion of the Court" as has been discussed in **Chapter 2** and this **Chapter 8**. The high court made it clear that an increasingly wide number of yet-undefined

¹²⁰ **Exhibit "C"**, *Petition*, 83.

¹²¹ See n. 103, **Chapter 7**, *supra*, and accompanying text.

¹²² **Exhibit "D"**, "Brief on Behalf of the Commonwealth," 2, only says that the enabling Act provides "by special proviso in the Act [that it] does not alter the provision of section 4570 [the closing law]."

circumstances potentially could constitute a “necessity,”¹²³ entitling the defendant to seek a jury verdict of exemption from the closing law on that ground.

(f) Epilogue — End of the *Francisco* Prosecution.

The *News Leader* carried a December 7, 1942, page 1 article reporting the supreme court *Francisco* opinion reversing, that day, defendant’s conviction.¹²⁴ Upon remand to the trial court, the Commonwealth’s Attorney, after cogitating most of the ensuing year, dismissed the case by filing a *nolle prosequi* motion on September 20, 1943, without attempting the new trial *Francisco* authorized.¹²⁵ This answers in the negative the second

¹²³ Although decrying the inadequacy of past definitions, the court essentially retained them, despite attempting to restate the issues discussed. Thus *Francisco* asserts, 180 Va. 371, 379: “[I]t is difficult to understand how a particular work may be moral and fit in one community and immoral and unfit in another. And yet, on the other hand, all of the authorities agree that a particular work may be a necessity in one community and not in another, depending upon the peculiar circumstances of the case.” Paraphrasing Justice Potter Stewart, see n. 33, **Chapter 4**, *supra*, and accompanying text, the Virginia high court justices knew “necessity” after-the-fact “when they saw it.” It was becoming evident that if nude bathing suppression (*Lakeside Inn*) or beer sales (*Francisco*) could constitute a Sunday “necessity,” according to the supreme court, then just about anything else could be a “necessity” as well, rendering the term “nearly meaningless,” see n. 34, **Chapter 4**, *supra*, and accompanying text.

¹²⁴ *News-Leader*, December 7, 1942, 1: “**Sunday Sale Of Beer Held Not Illegal** The State Supreme Court today held that the sale of wine and beer in Virginia on Sunday is not unlawful and remanded the case brought against M.G. Francisco, a Hanover County merchant, to the Hanover Circuit Court for a new trial”

¹²⁵ Common Law Order Book #19, Hanover County Circuit Court, 379. **Exhibit “J”**. *Black’s Law Dictionary* (7th ed), s.v. “nolle prosequi”: “[A] formal entry on the record by the prosecuting officer . . . that he will not prosecute the case further. . . . It is a judicial determination in favor of the accused and against his conviction, but it is not an acquittal, nor is it equivalent to a pardon. [citing 22A C.J.S. *Criminal Law* § 419 at 1(1989)].”

question first raised in **Chapter 2** herein (i.e., whether a new trial was ever held).¹²⁶

(g) Concluding Comments on *Francisco*.

Many of the paradoxes characterizing Sunday closing laws since their inception were reprised in *Francisco*. In probably the earliest governmental restricting of Sunday work, the Edict of Constantine in 321 C.E., agricultural workers, could work on Sunday “lest by neglecting the proper moment . . . the bounty of heaven should be lost.”¹²⁷ This described, in a roundabout way, “necessity” as permitting Sunday labor, a concept still troublesome to define in *Francisco*, over 1,600 years later, as its testimony revealed.

Confusion over just what was permitted on Sunday was no doubt exacerbated in Roman times because their “market days”, traditionally recurring in an eight to nine day-cycle, were incorporated into the weekly Christian Sabbath.¹²⁸ This made it difficult to determine if the Sabbath was for “rest” or “recreation,” the latter, of course, giving rise to Sunday employments to satisfy popular recreational tastes. These were arguably in violation of closing laws, whether that labor be in village fairs in the middle ages¹²⁹ or M. J. Francisco dispensing beer at his store in Hanover County, Virginia on September 7, 1941.

Not so much the closing law itself, but its “necessity” exception, was at the crux of *Francisco*. Charles E. Clark, writing of rules in procedural codes, described how “bad or

¹²⁶ See **Chapter 8(a)**, supra; and n. 16, **Chapter 2**, supra, and accompanying text.

¹²⁷ See n. 19, **Chapter 3**, supra, and accompanying text.

¹²⁸ See n. 18, **Chapter 3**, supra, and accompanying text.

¹²⁹ See n. 25, **Chapter 3**, and n. 19, **Chapter 4**, supra, and accompanying text.

harsh” decisions “drive out the good, so that in time a rule becomes entirely obscured by its interpretive barnacles.”¹³⁰ Similarly, the ostensible closing law “rule” banning Sunday labor became “entirely obscured” in Virginia appeals from 1922 to 1942, by its “necessity” exception. Such a “necessity” defense came to the forefront in *Francisco* when the defendant learned of petitions to the County Board of Supervisors to ban Sunday beer sales. Thereafter, on July 1, 1941, Supervisor Thompson moved that the Board prohibit “the sale of beer and wine in Hanover County on Sunday, which received no second and was lost.”¹³¹

Defendant’s appeal brief almost, but not quite, anticipated the *Francisco* appeal’s outcome. Key to the supreme court’s decision was the Hanover County Board of Supervisors not banning Sunday beer sales, even though it had new authority to do so, due to a 1938 amendment to the enabling act. Francisco’s lawyers explained that the significance of the Board of Supervisors actions was as follows:

[W]hat is or is not a necessity is . . . determined by juries who reflect the community’s opinion . . . [A] necessity in one place may not be in another. Under this [*Pirkey*] holding a jury . . . might say that the sale of beer is not a

¹³⁰ Charles E. Clark, “Special Problems in Drafting and Interpreting Procedural Codes and Rules,” *Vanderbilt L. Rev.*, 3(1950):493, 498.

¹³¹ **Exhibit “C”**, *Petition*, 86 (Testimony of C. W. Taylor, Clerk, Board of Supervisors, summarizing a “certified copy of the [Board] minutes” which he had been subpoenaed to produce, to which he “refer[red] in the record,” and which was, by the Judge’s order, “put . . . in the record [for the appeal, but] not for the jury,” *ibid.*) It is interesting, perhaps almost ironic, that “Supervisor Thompson” in this footnoted sentence, is probably the same “Supervisor J. M. Thompson” whose death resulted in Judge Bazile’s appointing Joseph Z. Johnson as Supervisor in his place. Johnson was extensively discussed in nn. 8 and 35-38, this **Chapter**, *supra*, and accompanying text. See attached **Exhibit “E”**, in the Appendix for the full text for his appointment as a County Supervisor.

... necessity, [or] that it is ... , in which case the sale would not be unlawful Then, if that jury did not truly reflect the community's opinion, [it] ... could be reflected by adoption of a local ordinance by the Board of Supervisors, making the sale unlawful, regardless of ... the jury.

[Thus] ... , each locality is now given two opportunities to express the community's opinion of the ... propriety of selling beer on Sunday, one through its juries and the other through its duly elected representatives, whereas it had only one prior to the ... [enabling] Act of 1938.¹³²

Comparing this portion of defendant's brief with the *Francisco* holding quoted earlier,¹³³ the supreme court went defendant *Francisco* one better by concluding

the trial court erred in excluding from the jury evidence that the board of supervisors ... had considered and failed to enact an ordinance prohibiting the sale of beer on Sunday [which was] ... pertinent and material on whether the work of selling beer on Sundays was reasonably essential to the economic, social or moral welfare of the community.¹³⁴

That is, the court went beyond merely holding that the jury could decide if beer sales qualified as a Sunday "necessity." It additionally ruled that in so deciding, the jury could also infer, at its option, that the Board of Supervisors' *not* banning Sunday beer sales was evidence the community viewed such sales as a closing law "necessity," exempt from prosecution. In so doing the court engaged in verbal sleight-of-hand, by describing "necessity" in the immediately preceding quotation¹³⁵ as "reasonably essential to the economic, social or

¹³² **Exhibit "C".** *Petition*, 13 (Defendant's brief to the Supreme Court).

¹³³ See n. 119, this **Chapter**, *supra*, and accompanying text, quoting the relevant portion of the Virginia Supreme Court's "necessity" instructions.

¹³⁴ *Francisco*, 180 Va. 371, 381-382.

¹³⁵ As the Virginia Supreme Court ruled in the portion of its *Francisco* opinion
(continued...)

moral welfare of the community.” This gave a far broader meaning to “necessity” than Judge Bazile contemplated in his January 19, 1941 “Opinion of the Court”:

[H]ow can it be said that the sale of beer on Sunday is a work of necessity or capable of being made such? The vendor of beer cannot show that its sale on Sunday is necessary to save himself from serious or unexpected loss or that its sale on Sunday is necessary to save the public from unusual discomfort or inconvenience.¹³⁶

The practical result of this broader “necessity” definition was that many more circumstances, based on *Francisco*, jurors could decide was a closing law “necessity,” exempting a defendant from prosecution. Virginia thus conformed to a national trend to more broadly define closing-law “necessity”, so that it became, in the opinion of at least one scholar, “virtually meaningless.”¹³⁷ Indeed, judges in Virginia and elsewhere in the United States essentially defined “necessity” by paraphrasing, in so many words, Supreme Court Justice Potter Stewart: they “knew it when they saw it,”¹³⁸ but without reasoned analysis.

In plain fact, in *Francisco*, Hanover County’s Board of Supervisors took no action concerning Sunday beer sales. A motion was made to ban such sales, which died for want of a second. There was no evidence at trial of any further Board consideration of the issue.

¹³⁵(...continued)
quoted at n.119 and accompanying text, this **Chapter 8**, *supra*.

¹³⁶ **Exhibit “C”**, *Petition*, “Opinion of the Court,” 27 (Bazile, circuit judge). The high court’s definition of “necessity” was also broader than standard dictionary definitions, see n. 68, **Chapter 9**, *infra*.

¹³⁷ See n. 34, **Chapter 4**, *supra*.

¹³⁸ See n. 33, **Chapter 4**, *supra*, and accompanying text.

Although the supreme court, as already quoted, said the jury could take into account that the Board “had considered and failed to enact the ordinance” prohibiting Sunday beer sales, that premise appears mistaken. The Board could not have “considered” a resolution not seconded, because it was never brought before the meeting, an elementary and widely-recognized parliamentary procedure rule for conducting meetings of businesses and elective bodies.¹³⁹

As significant as the problems confronting closing law defendants was the issue of how someone *became* such a defendant. Clearly M. G. Francisco was not prosecuted because of Hanover County’s abstract desire to prevent Sunday labor. Instead, that prosecution was due to a competing business, closed on Sunday, seeking to advantage itself over Francisco, who was open on Sunday. Examples were given from other jurisdictions of closing laws being used for commercial advantage, similar to what was found in *Francisco*.¹⁴⁰

The *Francisco* press coverage clearly reported that the Sunday commercial activity was expected to significantly decline if Judge Bazile’s opinion was actually enforced state-

¹³⁹ See *The Scott Foresman Robert’s Rules of Order*, newly revised, 9th ed., Henry M. Robert III, William J. Evans and James W. Cleary, ed. (n.p.: Scott Foresman, 1990), 34-35: “After a motion has been made, . . . [i]f no member seconds the motion . . . the chair says, ‘The motion [or ‘resolution’] is not seconded; or, ‘Since there is no second, the motion is not before the meeting.’” Of course, *Roberts Rules of Order* could not prevail against the state’s highest court holding, as in *Francisco*, that the jury could consider the Board of Supervisors’ failure to act as evidence of a community determination of beer sales as a Sunday “necessity.” The *Rules*, however, show how contrary the court’s interpretation was to long-established meeting procedure rules. Although the rule is more detailed in the above 1990 version, the same general result is suggested in General Henry M. Robert, *Robert’s Rules of Order Revised* (Chicago: Scott-Foresman, 1943), 36-37.

¹⁴⁰ See nn. 39 - 45, this **Chapter**, *supra*, and accompanying text.

wide. The *Times-Dispatch* the day after the trial, for example, stated “hundreds of articles now sold on Sunday are sold in violation of the blue law” if the Virginia Supreme Court affirmed that ruling.¹⁴¹

The closing law’s intent to regulate social conduct by banning Virginia Sunday labor, was not achieving its goal in 1941.¹⁴² Actual public behavior was markedly different from the norm the statute sought to enforce. Thus, as in *Francisco*, the comparatively few prosecutions brought probably had an impetus other than a benign desire for uniform suppression of Sunday labor, most likely a commercial advantage sought by a business rival.¹⁴³

¹⁴¹ See n. 51 [subdivision (1)(b) therein (dated October 18, 1941)], this **Chapter**.

¹⁴² As de Tocqueville observed, “public opinion, much stronger than the law,” made Sunday work-suspension effective. See n. 20, **Chapter 6**, *supra*, and that opinion was changing in 1941 Virginia.

¹⁴³ Arguably, too much weight concerning a hidden business-competition motive for closing-law prosecutions was drawn from *Francisco* alone. However, (1) Indications of wider problem concerning commercial business-competition motives were discussed, see nn. 42-45, *supra*, and accompanying text; and (2) The *Francisco* court, by disclosing the vast numbers not being prosecuted for closing law violations, (see n. 66, *supra*, and accompanying text), recognized that (a) unfair selective prosecution was occurring; and (b) since directly voiding a prosecution for that reason was proscribed by current law, (see n. 63, *supra*, and accompanying text), (c) reached the same result indirectly through holdings like *Francisco*, making closing law prosecutions more difficult. [All referenced footnotes are in this **Chapter**.]

Chapter 9. CONCLUDING ANALYSIS AND OBSERVATIONS.

Laws requiring cessation of labor on the primary day of weekly religious observances, Sunday in traditionally Christian nations (“Sunday closing laws”), were characteristic in many States of the United States, including Virginia, until relatively recently. The frequency of this practice paralleled confusion about its origins and purposes, still-apparent in Virginia closing-law litigation in *Francisco* in 1942, when this thesis concludes.

Judeo-Christian tradition ascribed a religious basis for the seven-day week and its recurring primary religious observance on one day of that week, commanded by the Hebrew deity. Labor also was to cease that day, the deity reportedly commanded, to commemorate the deity’s day of rest following six days spent creating the universe.¹

Confusion, however, about this seemingly straightforward biblical explanation arose, first, from another Bible passage ascribing Israel’s escape from Egyptian bondage as the origin of the week’s seventh day rest, not the universe’s divine creation.² Second, scholars learned the Babylonian Empire, while dominating Israel, had a new-moon, mid-month, religious-day celebration, spawning three other similar religious days spread through each month; each approximately seven days apart from any the of other such days (including the mid-month celebration). Work ceased on each such day. These four special days were called *shabbutu* meaning “rest” to the Babylonians, obviously similar to the later Hebrew *sabbath*

¹ See n. 7, Chapter 3, *supra*, and accompanying text.

² See n. 9, Chapter 3, *supra*, and accompanying text.

for the Jewish weekly religious-observance day,³ suggesting the latter was derived from the former. These days of “shabbutu” which the Babylonians feared (except at mid-month), however, contrasted with the joy accorded the biblical sabbath. This created a basis for confusion about whether dread or joy was to be associated with the sabbath, among the earliest of many such confusions about its purpose.⁴

Christianity’s derivation from Judaism created more sabbath confusion. The reputed spring resurrection of its namesake on a Sunday (now Easter Sunday) caused Christians to shift their weekly sabbath to Sunday. Since this occurred within the Roman Empire, a wide venue was provided to disseminate this new religion. It also expanded, in part, due to a newly common acceptance of the seven-day week. Traditional Roman “market days,” recurring every eight-to-nine days, were incorporated into Sunday. This likely increased confusion, present in *Francisco*, of whether “rest” of the Old Testament sabbath or “recreation” of the Roman market days, was to occur on Sunday.⁵

Christianity’s widening acceptance presumably influenced Roman Emperor Constantine’s 321 C.E. decree to suspend work on “the venerable day of the sun;” exempting agricultural workers, however, “lest . . . the bounty of heaven may be lost.”⁶ The early European Middle Ages lacked consensus about whether Christian Sunday sabbaths required

³ See n. 5, **Chapter 3**, *supra*, and accompanying text.

⁴ See n. 3, **Chapter 3**, *supra*, and accompanying text.

⁵ See nn. 12, 16 and 18, **Chapter 3**, and accompanying text.

⁶ See n. 19, **Chapter 3**, and accompanying text.

the same work cessation as the original Hebrew sabbaths.⁷ Work restrictions, however, gradually became increasingly enforced in England and continental Europe.⁸

England's views on Sunday work regulation after English King Henry VIII's 1533 confiscation of the English Catholic Church were influenced by a developing Puritan ideology. English Puritans, increasingly dominant in government and church, saw the Sunday sabbath as critical preparation-time to assure a better secular Kingdom on earth and more likely salvation thereafter. The protestant work-ethic reemphasized Sunday's importance for rest and reflection, to better prepare for even more diligent work on the week's other six days. All this fed into a Puritan dislike of Sunday sportive play, also encouraging government Sunday regulation, to assure worship was conducted and attended, without the interference of labor or recreation.⁹

After the Virginia colony's foundering start from 1607 to 1610, its proprietors thereafter applied, among other things, Puritan strictures against Sunday secularism, to improve the discipline and through it, the performance, of the colonists. Church attendance was required, enforced by guards locking settlement gates and searching non-church buildings for shirkers during worship services.¹⁰

This severe discipline impeded immigration, which the proprietors sought to over-

⁷ See n. 25, **Chapter 3**, *supra*, and accompanying text.

⁸ *Ibid.*

⁹ See nn. 4 - 19, **Chapter 4**, *supra*.

¹⁰ See n. 20, **Chapter 4**, *supra*, and accompanying text.

come by creating a an elected colonial assembly. The resulting “House of Burgesses,” though manipulated by upper classes, reflected self-government unusual for its time.¹¹ Review of its legislation shows the importance colonists placed on regulation of Sunday labor and worship.¹² The difficulty with laws prohibiting Sunday work, however, as events (including the *Francisco* case) would show, was not so much that general rule; but rather how to define exceptions so essential work could be performed on Sunday, despite the general prohibition. The result was unremitting tension between heaven’s perceived mandates against sabbath work, contrasted with an earthly reality that certain work could not be deferred, despite closing-law dictates. The shorthand description of the type of Sunday work allowed was embodied in the statutory term “necessitie” the Burgesses used¹³

As a practical matter, the closing law “necessity” exception to Sunday work (and its first-cousin “charity” exception as well), to a significant degree, swallowed up the general rule that Sunday work was not allowed. As the years progressed, reviewing courts deemed a continually wider range of conduct to satisfy the “necessity” exception, rendering the term “nearly meaningless.”¹⁴ The metaphorical handwriting leading to this conclusion was clearly on the wall in 1942 when *Francisco* was decided. Indications of the problem, however, were already visible in the colonial era, when prominent landowners considered themselves

¹¹ See n. 23, **Chapter 4**, *supra*, and accompanying text.

¹² *Ibid*, n. 24, **Chapter 4**, *supra*, and accompanying text.

¹³ See n. 30, **Chapter 4**, *supra*, and accompanying text.

¹⁴ See n. 34, **Chapter 4**, *supra*, and accompanying text.

compelled to work on Sunday, searching for new lands to replace plantations worn out by soil-destroying tobacco farming.¹⁵

America's independence resulted in the Declaration of Independence and Virginia's 1776 Constitution declaring Virginia free from prior connections with Britain.¹⁶ Virginia post-revolutionary legislation voided all English religious regulation statutes.¹⁷ At about the same time, Virginia enacted, in its 1776 "Declaration of Rights," provisions for religious freedom.

Jefferson's Virginia Statute for Religious Freedom¹⁸ was adopted on January 16, 1786.¹⁹ Leaving aside scholarly disagreements on its meaning,²⁰ its text says that "no man shall be compelled to frequent or support any religious worship," nor be "restrained, molested or burthened . . . on account of his religious opinions," but "shall be free to profess, and by argument to maintain . . . opinions in matters of religion"²¹ without diminishing one's "civil

¹⁵ See n. 40, **Chapter 4**, *supra*, and accompanying text.

¹⁶ See n. 2, **Chapter 5**, *supra*, and accompanying text.

¹⁷ See n. 3, **Chapter 5**, *supra*, and accompanying text.

¹⁸ A Jefferson biographer called this enactment the "Bill for Religious Freedom" before adoption, and "Statute for Religious Freedom" thereafter, Peterson, *Thomas Jefferson and the New Nation*, 141. Jefferson's self-written epitaph called it the "Statute of Virginia for religious freedom," n. 1, **Chapter 1**, *supra*, herein.

¹⁹ Details of its adoption are set forth in n. 20, **Chapter 5**, *supra*, and accompanying text.

²⁰ See n. 11, **Chapter 5**, *supra*.

²¹ See n. 17, **Chapter 5**, *supra*, and accompanying text.

capacities.”²² This fairly seemed to preclude, or at least discourage, governmental reliance on, or regulation or support of, any religion.

A little over ten months later, in contrast, the legislature enacted the first post-revolutionary Sunday closing law, imposing monetary forfeiture on one who, on Sunday, “be found labouring at his own or any other trade or calling . . . in labour or other business except . . . work of necessity or charity.”²³ These provisions were relatively unchanged from 1786 through the *Francisco* 1942 appellate decision with which this thesis concludes.

At the least, the closing law seemed to contradict major assumptions of Jefferson’s religious freedom statute. The closing law “restrained” citizens from ignoring Sunday’s mandated rest. If they did not do so, they were statutorily “diminish[ed]” in their “civil capacities,” through forfeitures.²⁴ Remarkably, research of Julian Boyd, editor of a major Thomas Jefferson document compilation, revealed that Jefferson, drafter of the Virginia Statute of Religious Freedom, also either drafted or approved Virginia’s closing law.²⁵

Jefferson’s virtually simultaneous proposal of two such philosophically contradic-

²² Ibid.

²³ Ibid.

²⁴ Ibid. The quotations in the paragraph are from Jefferson’s Religious Freedom Statue, as quoted two paragraphs before the footnoted paragraph.

²⁵ See n. 24, **Chapter 5**, *supra*, and accompanying text. Jefferson chaired a legislative committee tasked to formulate new legislation required by the Revolution. Jefferson himself drafted much of this legislation and, as Committee chair, reviewed virtually all the rest. The legislation was presented to the legislature in 1779, but not adopted until the Revolution was over in 1785-1786. See n. 20(3), **Chapter 5**, *supra*, and accompanying text.

tory statutes is puzzling.²⁶ His statute for religious freedom eloquently decried government interference with or support of religion. In contrast, Virginia's Sunday closing law mandated ceasing Sunday labor, obviously supporting strictures against Sunday work that organized Christianity required.

Jefferson's seemingly contradictory, simultaneously-held, attitudes about the relation of government and religion, revealed by his involvement in the two above-described statutes, mirrored conflicting public attitudes on the same topic. This conflict was illustrated by the United States Supreme Court's unanimous conclusion in *Church of the Holy Trinity v. United States* that this was a "Christian nation;"²⁷ contrasted with the American Treaty with Tripoli stating the country was "not, in any sense, founded on the Christian religion," approved without dissent by the United States Senate in 1797.²⁸

These examples reveal powerful, contradictory, national forces, for and against government attachment to religion, near the closing law's 1786 adoption. Jefferson had a penchant for what Joseph Ellis called "seductive fictions" and to play "fast and loose with

²⁶ Jefferson did not literally make these "virtually simultaneous proposals" of legislation in 1786 because he was then in Paris as minister to France. His "faithful lieutenant" James Madison did so. See nn. 159 and 160, *supra*, and accompanying text.

²⁷ An 1892 case, but relying on 100-year-earlier precedent, see **Chapter 5(c)(1)** herein, *supra*.

²⁸ See n. 39, **Chapter 5**, *supra*, and accompanying text. The quoted treaty text was authoritatively determined in the 1920s to be a false translation of the original arabic. It was nevertheless believed genuine by the United States Senate in 1797, which ratified the Treaty containing it without dissent. See **Chapter 5(c)(2)** herein.

historical evidence on behalf of a greater cause.”²⁹ Perhaps, a murky record suggests, this was congenial to his sponsoring the closing law as an offset to obtaining adoption of his Virginia Religious Freedom Statute and other statutory welfare measures.³⁰

In the nineteenth century there was limited appellate activity under the Virginia Sunday closing law. Appeals in other states, however, gave fair indication of how its enforcement was developing, providing valuable guidance for later Virginia appeals. It is evident that nineteenth century appeals in states other than Virginia, collected in **Chapter 6(a)** (1) herein, supra, did not arise from an abstract desire to reduce Sunday work. Instead, they involved defendants, including large businesses of the day, using the closing law as a foil to avoid otherwise unpardonable injuries to plaintiffs, whose “misdeeds” were little more than inoffensively traveling or working on that day, a nominal closing law violation.³¹

Other New England courts similarly applied their state closing laws to excuse breach-of-contract defendants from liability for Sunday failures to properly care for leased horses and livery.³² Still other courts, however, held that Sunday wrongdoings by tort or contract defendants were not excused by the plaintiffs’ traveling or working on Sunday, even if

²⁹ See n. 63, **Chapter 5**, supra, and accompanying text.

³⁰ See n. 72, **Chapter 5**, supra, and accompanying text preceding and following that footnote.

³¹ See nn. 2 - 4, **Chapter 6**, supra, and accompanying text.

³² See nn. 5 - 7, **Chapter 6**, supra, and accompanying text.

violating a state closing law.³³ Society was becoming too complicated, concluded the 1829 U.S. Senate Report of the Committee on Post Offices and Postal Roads, to have vital parts of it, including Sunday mail transport, interrupted for 24 hours.³⁴ His Committee thus declined church-group petitions to ban such Sunday transport for religious reasons. Virginia's Sunday closing law received United States Supreme Court review in *Powhatan Steamboat Co. v. Appomattox R.R.* (1860).³⁵ Plaintiff steamboat company sued for damages to goods it shipped from Baltimore to City Point, Virginia, which were un-loaded on a Sunday to defendant railroad's City Point warehouse, for transshipping the following day (Monday). The trial court found the Sunday fire that destroyed plaintiff's goods was caused by defendant's breach of duty, a finding not challenged on appeal.³⁶ That court, however, also effectively held defendant railroad not liable for the Sunday fire in its warehouse destroying plaintiff's goods, solely due to the Sunday closing law.³⁷

The Supreme Court adroitly reversed the trial court. Without overtly criticizing

³³ See nn. 11 - 13, **Chapter 6**, *supra*, and accompanying text.

³⁴ See nn. 14 - 16, **Chapter 6**, *supra*, and accompanying text.

³⁵ 65 U.S. (24 How.) 247 (1860). See also **Chapter 6(b)** herein, *supra*.

³⁶ See nn. 21-24, **Chapter 6** and accompanying text. *Powhatan* was a "diversity" action [federal civil suit with parties from different states; s.v. "diversity," *Black's Law Dictionary* (7th ed.)]. The "Rules of Decision Act" requires that state law applies (unless barred by federal constitution or statute), see n. 3, **Chapter 6**, *supra*. That would include Virginia's closing law because the damage litigated occurred on Sunday in Virginia.

³⁷ See nn. 30 - 32, **Chapter 6**, *supra*, and accompanying text.

Virginia's closing law, the Court emphasized interpretation difficulties that law created,³⁸ disapproving of it by implication. The Court's holding, consistent with that implied criticism, significantly narrowed the closing law by first holding that certain of defendant's duties, such as safekeeping plaintiff's entrusted goods, were independent of defendant's contract to store and transship them. These duties were, therefore, unaffected by the closing law as well and thus, the Court held, that law could not prohibit their Sunday performance.³⁹

Second, *Powhatan* alternatively held that even if these non-contractual duties were assumed to be subject to the closing law, that defendant railroad was still required to protect the plaintiff steamboat company's property on Sunday as a closing-law "necessity."⁴⁰ The failure to do so, evidenced by the Sunday fire destroying plaintiff's goods in defendant's warehouse, rendered defendant liable to plaintiff despite the closing law.⁴¹

The Virginia Supreme Court's closing law holdings generally, with occasional exceptions, resembled the United States Supreme Court's approach just described in *Powhatan*. It espoused no overt distaste for Virginia's closing law, but when no clear precedent

³⁸ See n. 36, **Chapter 6**, *supra*, and accompanying text. The Court was conscious of the influence of its opinions long before 1860, see n. 37, **Chapter 6**, *supra*.

³⁹ See n. 41, **Chapter 6**, *supra*, and accompanying text.

⁴⁰ See nn. 43 and 44, **Chapter 6**, *supra*, and accompanying text.

⁴¹ Technically, the Court remanded the case to the trial court to "issue a new venire," 65 U.S. at 257, i.e. a new "jury panel" for a new trial. See s.v. "venire", *Black's Law Dictionary* (7th ed.). However, given the rulings of law based on undisputed facts in *Powhatan* by the highest court of the land, such a "new trial" would be confined to damages, not liability, since the latter had already been determined by the Supreme Court.

or statute stood in its way, with fair consistency it narrowed the law's impact, favoring the freeing of Sunday labor from its restrictions. Though this thesis debated details of some of the Virginia Supreme Court's closing-law opinions,⁴² from a different view they can be said to collectively comprise a complicated verbal tapestry with a defined object. The court first buttressed, unasked, the closing law's constitutionality, apparently conforming to popular Virginia opinion.⁴³ Then, it interpreted the closing law in succeeding cases to generally allow continuing expansion of labor and other Sunday business activity, contrary to that law's supposed intention. This apparently accorded with the preferences of Virginia's public.⁴⁴ That is, Virginians wanted the comfort of a closing law, but did not, as a practical matter, want it to materially restrict their Sunday activities, particularly recreation. The Virginia Supreme Court's unarticulated but nearly-consistently-followed twentieth century response until the 1942 conclusion of this thesis seemed, in essence, to strive to give the public what it wanted,

⁴² See **Chapter 7**, nn.: 15, 27(sentence following n.27) 21-32, 50, 52-66, 77, 83-87, 103, 107, 112, 120, 123-126, 135, and 137-147 and accompanying text; and **Chapter 8**, nn. 118, 123, 127-128, 137-138 (and paragraph following n. 138), and 140-141, *supra*, and accompanying text.

⁴³ See nn. 39-49, **Chapter 7**, and accompanying text.

⁴⁴ Public satisfaction with existence (contrasted with enforcement) of the closing law is inferred from the absence of any contrary claims in the briefing of *Pirkey, Lakeside* and *Francisco*, and the absence of dissatisfaction expressed about the law, *per* the *Francisco* news reports quoted, even with reason to fear substantial inconvenience because of it. See nn. 89 and 92, **Chapter 8**, *supra*. For public desire to not actually be restricted by closing law, see n. 92, *ibid.*: (1) *Times Dispatch*, October 18, 1941 . . . (b) “. . . it would appear [due to *Francisco* trial] hundreds of articles now sold on Sunday are sold in violation of the blue law.” Thus, the public, as this passage made clear, understood they were extensively benefiting from businesses operating on Sunday that the closing law prohibited.

by interpreting the closing law to simultaneously achieve both these contradictory public desires, as best it could.

This pattern began in *Hortenstein v. Virginia Carolina RR* (1904),⁴⁵ Virginia's first twentieth-century closing law appeal. The court denied that a recovery could be solely based on defendant railroad having caused an injury while running locomotives on Sunday in violation of the closing law. Proof of negligence was still required, as in any other personal injury claim.⁴⁶ By reverse inference, this presumably meant that Virginia aligned itself with cases collected in thesis **Chapter 6(a) (2)** herein, supra, denying that the closing law excused negligence or contract breaches inflicted on Sunday closing law violators. That is, if defendant's closing law violation in *Hortenstein* did not allow plaintiff to forego proofs of negligence to win; then neither, in logic, could a defendant use a plaintiff's closing law violation, to overcome defendant's negligence, so the defendant could win.

The Virginia Supreme Court further limited the closing law in *Wells v. Commonwealth* (1907), by ruling it was not a criminal statute, so that its monetary "forfeit" was not a criminal fine, and was collectable only through a separate civil suit.⁴⁷ *Wells*, however, created new confusions which, metaphorically speaking, blew up in the Virginia Supreme Court's face in *Hanger v. Commonwealth* (1908) shortly thereafter. In *Hanger*, a blatantly

⁴⁵ See n. 2, **Chapter 7**, supra, and accompanying text.

⁴⁶ See n. 5, **Chapter 7**, supra, and accompanying text.

⁴⁷ See n. 6 - 8, **Chapter 7**, supra, and accompanying text.

improper attempt to evade the closing law⁴⁸ left the supreme court powerless to fine the closing law offender, because in *Wells* this same court had taken away the power of itself and the rest of the judicial branch to do so.

Wells and *Hanger* were legislatively overturned by a 1908 closing law amendment, specifying its violations were misdemeanors.⁴⁹ *Ellis v. Covington* (1917),⁵⁰ the first closing law appeal reaching the court thereafter, construed a municipal ordinance duplicating the amendment. *Ellis's* significance, however, is not due to its case-facts. Its closing law importance was its dictum intimating that Ellis, the appellant, a restaurant-owner in Covington, Virginia, “plainly could not, though licensed, ply his calling of selling such [soft] drinks on the Sabbath day in any way so as to escape liability under the ordinance.”⁵¹ Judge Bazile relied on this passage in his *Francisco* “Opinion of the Court,” calling it “a definite holding by the highest Court of the Commonwealth that the selling on Sunday of soft drinks pursuant to one’s regular business is a violation of the Sunday law.”⁵² The Judge’s point was that, in *Francisco*, any County-Supervisor beer-sale approval, still permitted no sales on Sunday, due to the closing law being engrafted onto the Supervisors’ beer-approval statute.

⁴⁸ See nn. 10-15, **Chapter 7**, *supra*, and accompanying text.

⁴⁹ See n. 16, **Chapter 7**, *supra*, and accompanying text.

⁵⁰ See nn. 17 - 19, **Chapter 7**, *supra*, and accompanying text.

⁵¹ *Ellis*, 122 Va. 821, 825 (emphasis added).

⁵² See nn. 109 - 112, **Chapter 8**, *supra*, and accompanying text. **Exhibit “C”**, *Petition*, “Opinion of the Court,” 25.

Today, with 20/20 hindsight, Judge Bazile's reliance on *Ellis* in *Francisco* appears misplaced. The statement quoted was not a "holding" as the Judge termed it, but "dictum" upon which, by definition, one cannot rely.⁵³ The above *Ellis* quotation ostensibly limiting the right to sell soft drinks on Sunday,⁵⁴ was contrary to the express words of the statute and, in any event, was not the precise point decided by the *Ellis* case.⁵⁵ The closing law provided that one could, indeed, escape its liability by exemptions under its "necessity" or "charity" exceptions from its otherwise-required Sunday suspension of labor. The Judge, however, apparently failed to anticipate the ingenuity with which "necessity" or "charity" exemptions could be found, and the receptiveness of the Virginia Supreme Court to them, rendering the closing law, like the necessity exception itself, "nearly meaningless."⁵⁶

This thesis offered several illustrations of the country's mood on matters related to

⁵³ Definition of "dictum" provided at n. 30, **Chapter 5**, *supra*.

⁵⁴ See n. 50, this **Chapter**, *supra*, and accompanying text.

⁵⁵ The danger of relying on dictum, as Judge Bazile relied on *Ellis* dictum in *Francisco*, was cogently explained by Chief Justice John Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821): "It is a maxim not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

⁵⁶ See n. 34, **Chapter 4**, *supra*; although this was a year 2000 viewpoint, for informed perception of disuse of existing closing laws as early as 1880, see n. 23, **Chapter 7**, *supra* (speaker at American Bar Association meeting).

closing laws immediately after World War I. The first was social commentator Frederick Lewis Allen's noting in the "three to four years" following the Armistice, a "subtle change" revealing, he said, a citizenry seeking to "relax," to have "a good time," to "shake off the bonds of puritanism," and "upset the long-standing conventions of decorum."⁵⁷ This suggested public passive resistance to enactments like Virginia's closing law.

Viewpoints were also supplied from the 1920-1921 issues of the Richmond, Virginia-based *Religious Herald* weekly newspaper, speaking for Virginia Baptists. An editorial, generating a supportive response from a reader in the Richmond city attorney's office, indicated reluctance by those who were both religiously inclined and educationally informed to rely upon, or recommend, a law of compulsory sabbath work-abstinence.⁵⁸ The distaste of those Virginia opinion makers about using closing laws to carry out religious aims, proved them better predictors of the Virginia Supreme Court's constitutional rulings in major 1920s closing law cases than the briefs of any of the litigants.

The importance of the next Virginia Supreme Court closing law appeal, *Pirkey Brothers v. Commonwealth* (1922) ("*Pirkey*"), was not about the issue appealed.⁵⁹ The defendant-appellants were jury-convicted for operating their cave-viewing tourist attraction

⁵⁷ See n. 20, **Chapter 7**, *supra*, and accompanying text.

⁵⁸ See nn. 22-25, **Chapter 7**, *supra*, and accompanying text.

⁵⁹ *Pirkey*, 134 Va. 713; 114 S.E. 765 (1922); and n. 237, *supra*.

on Sunday.⁶⁰ Their briefing to the Virginia Supreme Court was woefully deficient, underlined by that court's describing their case as "anomalous,"⁶¹ rejecting it in a half-page paragraph in the supreme court's eighteen printed opinion in the case. The supreme court in *Pirkey* used about five and one-half printed pages to supply a constitutional justification for the closing law (unasked by either litigant), apparently assisting closing law proponents.⁶² Then, similar to the technique used by United States Supreme Court Chief Justice John Marshall in *Marbury v. Madison* (1803),⁶³ *Pirkey* next spent about seven more printed pages imposing closing law trial procedures sure to impede future prosecutions. The Commonwealth could not complain because, like the Jeffersonian executive-branch officials prevailing in *Marbury*, it had won the issues actually contested in the appeal.⁶⁴

Thus it appears the court decided *Pirkey*, not because of the importance of any issue raised in its appeal, but as an opportunity to lay down rules controlling how future closing

⁶⁰ See n. 28, **Chapter 7**, *supra*, and accompanying text.

⁶¹ See nn. 29-32, **Chapter 7**, *supra*, and accompanying text; and *Pirkey* at 730 (speaking of the case as an "anomalous" appeal).

⁶² *Pirkey* held, 134 Va. at 725: "Laws setting aside Sunday as a day of rest are upheld not from any right of the government to legislate for the promotion of religious observance, but from the right to protect all persons from the . . . debasement which comes from uninterrupted labor." Quoting *Hing v. Crowley*, 113 U.S. 703, 710 (1885).

⁶³ See nn. 67 - 70, **Chapter 7**, *supra*, and accompanying text.

⁶⁴ Primary *Pirkey* rulings restricting closing law prosecutions were: (A) "Necessity" was not confined to its eighteenth century meaning, but broader contemporary meaning; and (B) Virtually every issue was to be decided by jury, even if different juries reached contradictory verdicts under the same facts. See nn. 56-60, **Chapter 7**, *supra*, and accompanying text.

law cases were to be presented and decided at trial. The first rule supported the closing law's constitutionality, thus seemingly strengthening its enforceability. The second, in contrast, provided restrictive procedures for trying closing law cases, weakening the enforceability of the statute that the court's constitutionality rulings had just sustained. *Pirkey* was immediately used for the latter purpose by the supreme court in *Lakeside Inn, Corp. v. Commonwealth* ("*Lakeside*"),⁶⁵ a closing law opinion released the same day. *Lakeside* expanded the "necessity" exception to further restrict the success of closing law prosecutions.

The defendant Inn was jury-convicted for operating its swimming pool on Sunday. The supreme court reversed the trial court's barring of defendant Inn's evidence and jury instructions. The evidence was the sheriff's testimony that its Sunday pool operation reduced nude-swimming arrests, which the court held it was error to exclude.⁶⁶ The jury instruction error, the court held, was to deny defendant the opportunity it unsuccessfully requested at trial for the jury to consider if "the work of conducting [*Lakeside's*] . . . bathing pool is a *necessity* within the meaning of the statute" and if so "find the defendant not guilty," because the Sunday pool operation (supposedly) reduced nude bathing⁶⁷

Lakeside's critical widening of the closing law "necessity" exemption no longer limited it to the defendant's necessity, or the necessity of anyone with whom defendant dealt.

⁶⁵ See nn. 71 - 87, **Chapter 7**, *supra*.

⁶⁶ See nn. 73 - 78, **Chapter 7**, *supra*, and accompanying text.

⁶⁷ See n. 79, **Chapter 7**, *supra*, and accompanying text [quoting *Lakeside*, 134 Va at 705 (defendant's proposed instruction no. 4)].

Instead, the “necessity” was the benefit to anyone in the surrounding county, including some not having any contact with the defendant; all supposedly benefitted by the absence of nude bathing. The supreme court did not require that the defendant intended any such benefit (reducing nude-bathing) by its Sunday pool operation. In fact, defendant’s decision to operate its pool on Sunday appeared to be motivated by nothing more nor less than typical business profit-seeking. No proofs were adduced that it was intended to “benefit” anything except defendant’s bottom-line; certainly not the local county moral climate (through nude bathing reduction). Further, reducing nude-bathing, however arguably beneficial, could hardly be; deemed a “necessity” in the ordinary sense of the word.⁶⁸

What *Lakeside* further suggested was that the supreme court was willing to allow, through the “necessity” exemption, additional avenues for businesses to escape the closing law. The extent to which new “necessities” could now be “discovered” was even more tellingly revealed in *Francisco*, discussed in thesis **Chapter 8** herein, supra. Sunday beer sales, the *Francisco* court held, could be a “necessity,” if the jury so-decided. The court also reduced the threshold needed to satisfy the statute’s “necessity” standard by redefining the word to mean “reasonably essential to the economic, social or moral welfare of the

⁶⁸ See, s.v. “necessity”, *American Heritage Dictionary* (4th ed., 2000), “Pressing or urgent need”; *OED Micrograph* (see n. 224, supra): “3. The constraining power of circumstances; a condition or state of things compelling to a certain course of action.” *Webster’s Seventh New Collegiate Dictionary* (1969), “indispensability, . . . impossibility of a contrary order or condition, . . . urgent need or desire.”

community,”⁶⁹ certainly not sounding like “necessity” in the conventional dictionary understanding.⁷⁰ Further, in no real sense could it be said Hanover County determined there was any “necessity” for Sunday beer sales. *Francisco* deemed this decided (if the jury agreed) by the Board of Supervisors’ failure to act, as opposed to taking action, to ban or allow beer sales. A motion by one of the Supervisor’s to ban County Sunday beer sales died for want of a second to the motion, meaning there was no record of the Board of Supervisors as a whole reaching any decision on the matter.⁷¹

What was apparent in *Francisco*, as detailed in thesis **Chapter 8** herein, supra, was that the Sunday Closing Law’s effectiveness in late 1941 Virginia, even in bucolic Hanover County, to actually enforce cessation of Sunday labor was virtually a dead letter, in place as a matter of form but actually ineffective. The supreme court, in *Francisco*, indirectly acknowledged this by stating that eighty percent of the licensed merchants in the County were “openly” selling beer on Sundays.⁷² The transcript (**Exhibit “C”**) reveals, as the appellate opinion does not, that this evidence came from the County’s ABC inspector’s unchallenged testimony.⁷³ The supreme court’s adding “openly” to its description of the selling,

⁶⁹ See n. 119, **Chapter 8**, supra, and accompanying text, quoting from the *Francisco* opinion.

⁷⁰ See n. 68, this **Chapter**, supra, and accompanying text.

⁷¹ See nn. 120-122, this **Chapter 8**, supra, and accompanying text.

⁷² See n. 66, **Chapter 8**, supra, and accompanying text.

⁷³ See n. 65, **Chapter 8**, supra, and accompanying text, citing to the transcript testimony.
(continued...)

emphasized the wholesale dearth of closing law enforcement in the area, even though case law of the period did not allow such considerations to bar convictions.⁷⁴ The lack of such enforcement was what today is called “the elephant in the room,” the obvious fact that no one wants to discuss.

The *Francisco* transcript, also reveals, in a way the appellate opinion does not, trial Judge Leon Bazile’s deep involvement in generating the prosecution, in this close-knit community of over sixty years ago, in a way that would be almost unimaginable today. The chief complaining witness (Nichols) and the prosecutor acknowledged he was “directed by the Honorable Judge and the Commonwealth’s Attorney to bring evidence in Court,” before a criminal warrant was filed.⁷⁵

In retrospect, the Judge’s involvement may have impaired the prosecution. Confining the indictment only to beer sales⁷⁶ could have occurred at the Judge’s suggestion because of his long tenure as an assistant attorney general dealing with closing law appeals, and later legislative service when enabling acts allowing communities to ban sales of regulated pro-

⁷³(...continued)

mony.

⁷⁴ See n. 63, **Chapter 8**, *supra*, and accompanying text.

⁷⁵ See n. 54, **Chapter 8**, *supra*, and accompanying text, citing the transcript in **Exhibit “C”**.

⁷⁶ See n. 4, **Chapter 2**, *supra*, and accompanying text, citing supreme court *Francisco* opinion.

ucts such as spirits, were adopted.⁷⁷ Had the prosecution been limited to non-beer Sunday sales at Francisco's store,⁷⁸ there would have been less opportunity for the defendant to argue that the actions of the Board of Supervisors authorized Sunday beer sales on "necessity" grounds. No equivalent statutory power was given the Board to approve Sunday sales of non-alcohol items. Accordingly, defendant's "necessity" defense, based on the need for additional County economic activity could not have been mounted as easily if a beer sale had not been the basis of the prosecution.⁷⁹

⁷⁷ See nn.115-116, **Chapter 8**, *supra*, and accompanying text. The Judge's "Opinion of the Court," Exhibit "C", *Petition*, 29, revealed he contacted the attorney general's staff (perhaps his former colleagues at that office) to learn its policy concerning Sunday beer sales by ABC licensees. He also explained his view of the purposes of enabling acts allowing local communities to set (or eliminate) Sunday beer sale hours (e.g., "During . . . the prohibition regime in Virginia (1916-1933) the General Assembly acquired the extremely bad habit of enacting statutes allowing the political sub-divisions to parallel the criminal statutes relating to the prohibition of . . . ardent spirits." *Ibid.*, 31-32).

⁷⁸ There is basis to reasonably conclude that a prosecution could easily have been based on non-beer items sold. The supreme court in *Francisco* made clear it was undisputed that there was widespread sale on Sunday of merchandise nominally prohibited by the closing law: "It developed [from the trial testimony] that throughout Hanover county, which is just north of Richmond, and through which several arterial State highways run, restaurants, filling stations, and the like habitually sell such articles as sandwiches, beer, wine, soft drinks, cigars, cigarettes and tobacco to the local trade, picnickers, tourists and the traveling public on Sunday." 180 Va. at 374. Complaining witness Charlie Williams freely admitted he had bought beer on Sunday from Francisco's store for his own consumption, not as part of any prosecution "many a time." Exhibit "C", *Petition*, 45 (Response to question by the Court), further showing the widespread ignoring of the closing law, even as it concerned Mr. Francisco specifically, before this prosecution.

⁷⁹ See n. 119, **Chapter 8**, *supra*, and accompanying text, showing how the closing law (section 4570) and its "necessity" exception was connected to County Board of Supervisors regulation of Sunday beer sales under the 1938 enabling act.

A topic for further investigation would be whether Judge Bazile's involvement in *Francisco* was more than presiding at trial and advising complaining witness Nichols prior to the prosecution. Reasons for such considerations include the seeming uniqueness of two big-city (Richmond) newspapers covering what would otherwise be a distinctly minor misdemeanor trial. Press coverage, or even knowledge, of such a trial would seem to require notification from someone at court, presumably the Judge or someone acting at his direction.⁸⁰ (The Defendant, it is surmised, would want as little publicity as possible concerning the charges against him.)⁸¹ In addition, the trial was set on the Judge's docket at exactly the time the Methodists, well known for prohibition sentiments,⁸² were holding their state convention.

⁸⁰ It is unlikely that in Richmond front pages on October 18, 1941, had excess space due to absence of news that reports of the October 17 *Francisco* trial were needed to fill. For example, on October 17, the U.S. destroyer *Kearny* was torpedoed by a U-boat off Greenland, killing eleven sailors, raising concern of war commencing with Germany. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945*, 499, n. 375, supra. The *Kearny* story, along with substantial amounts of other crisis-ridden war news, crowded the front pages the same day as accounts of the *Francisco* trial: *Times-Dispatch*, October 18, 1941, 1: "**Berlin Finds Kearny Attack, Arms Debate 'Interesting.'**"

⁸¹ Conceivably the prosecution could be the source of the publicity, but Commonwealth's Attorney Simpkins seemed, despite his competence, retiring and not given to such initiative. This, however, is admittedly highly speculative; we simply do not know.

⁸² In a "lengthy reply to critics," a group of Methodist notables, during the 1928 presidential campaign, including Virginia's Methodist Bishop James Cannon, Jr., declared that "the Southern Methodist Church had long been 'a prohibition church' and had urged its members repeatedly to elect public officials committed to prohibition enforcement." Robert A. Hohner, *Prohibition and Politics: Life of Bishop James Cannon, Jr.* (Columbia, S.C.: Univ. of South Carolina Press, 1999) (eBook), 222, incl. n. 25, referencing an article in the July 22, 1928 *Richmond Times-Dispatch*, apparently containing the above quotation, in substance. Concerning the October 18, 1941, Virginia Methodist Conference, whose
(continued...)

The Judge presumably would have more control than anyone else over setting trial dates for cases on his docket. Accordingly, the occurrence of the *Francisco* trial at the same date as the Methodist Convention is arguably more than mere coincidence.

The Judge's long interest in the details of prohibition-related politics has been described.⁸³ The Methodists' traditional interest in the political ramifications of prohibition, was energetically reflected at their Conference, shown by statements reported in the local press accompanying the commendatory resolution for the Judge on October 18, 1941, the day after the *Francisco* trial, revealing the atmosphere of its adoption.⁸⁴ It seemingly would have taken a great deal of preplanning for passage of the Judge's commendatory resolution to be adopted at the Methodist conference the day after trial.⁸⁵ Even more effort would be needed to obtain

⁸²(...continued)

resolution praised Judge Bazile's *Francisco* rulings, the October 19, 1941, *Times Dispatch* front-page article reporting its proceedings, listed "Bishop James Cannon, retired," subject of the above biography, *supra*, this footnote, as "on the program." The stridency of the Conference proceedings on prohibition matters reported by the press, very much reflected the attitudes and approach of Bishop Cannon as disclosed by his biography, *supra*, this footnote.

⁸³ See n. 15, **Chapter 8**, *supra*, and accompanying text.

⁸⁴ *Times Dispatch*, October 19, 1941, p. 1: "LYNCHBURG (AP): The Virginia Methodist Conference yesterday adopted a resolution approving the decision of Judge Leon Bazile against the sale of beer on Sunday and volleyed 'amens' last night as it heard a report calling upon church people to 'make America as dry as the Sahara Desert.' . . . Last night's report . . . recommended that the State Legislature pass a bill confining the sale of all alcoholic beverages to ABC stores, requiring State-wide closing on Sunday of all wine and beer stores . . ."

⁸⁵ Typically, conferences such as the Methodists' on October 18, when convened, already have a full agenda, making the addition of new agenda items difficult. The Judge's "blue-law" ruling had to have been issued later than 4:00 PM of the day before the
(continued...)

press coverage of that resolution's passage the day after that. Transmitting the Judge's *Francisco* ruling after 4:00 PM or later of the October 17 trial in Hanover County,⁸⁶ to the

⁸⁵(...continued)

commendatory resolution (see n. 86, *infra*, this Chapter). For that resolution to be adopted, delegates must learn of its circumstances. This could not happen sooner than very late afternoon or early evening of the day before, of a minor trial, the details of which most persons in the state probably knew nothing. Further, a sufficient number of delegates would also have to agree to such a resolution. Typically also, a motion would then be needed to place the matter on the agenda, followed by debate, then drafting an appropriate resolution-text and its adoption, and finally its release early enough on October 18 for front-page placement on the earliest available coverage, October 19 morning *Times-Dispatch*. This appears difficult even if the Conference had known about the judge's ruling the morning of the trial on October 17. To accomplish adopting the Resolution within these same time limits when the Judge's ruling was not known until late-afternoon or evening of October 17 seems very difficult at best, if not impossible based on what is so far known. This suggests, therefore, pre-knowledge of how the judge would rule, before the Conference commenced.

⁸⁶ The Judge's ruling (commended by Methodist Conference the next day) being later than 4:00 PM of the October 17, 1941, *Francisco* trial is established through the transcript (Ex. "C") and *Times-Dispatch* coverage. The transcript reveals witness testimony until the lunch-break (usually lasting an hour-and-a-half in most courts, presumably beginning at noon). The transcript notes the lunch recess commencement (Exhibit "C", *Petition*, 86). After lunch, two final witnesses were examined, *ibid*, 86-91 (one of whom, the Supervisors Clerk was, took longer due to lengthy evidence admission arguments), followed by the Sheriff (see nn. 435-437, *supra* and accompanying text) followed by "extended argument on [jury] instructions," 91, *ibid*. (court reporter notes), which Overton Jones reported consumed two hours, *Times-Dispatch*, Oct. 18, 1941, "Hanover Verdict Bans Sale of Sunday Beer as Blue Law Violation," 1, continuation p. 12, resulting in the judge's instructing the jury, as incorrectly described by the press, "that a sale of beer on Sunday is a violation of the blue law." *Ibid*. (Incorrect because reading the trial transcript, Ex. "C", *Petition*, shows no such judicial statement). Assuming one-hour for lunch, starting at noon, plus an hour for the final two witnesses, including the argument over admitting the Board of Supervisors' records, and two hours of jury instruction argument (as Overton-Jones of the *Times-Dispatch* reported), it was not certain what "blue law" ruling the Judge would finally issue, until the jury instruction argument concluded. Accordingly, the Judge's ruling was unlikely to have been final earlier than 4:00 P.M. and very probably later (due to a likely longer lunch-break, and the Judge's presence on the bench until the end of trial, preventing his discussing the trial

(continued...)

Methodist Convention in Lynchburg, over one-hundred road miles away, resulting in a resolution praising the Judge's decision the Convention adopted the next day, October 18, and also generating front-page headlines about the resolution on the same day in one Richmond paper, the *News-Leader*,⁸⁷ and the day after, October 19, in the other, the *Times-Dispatch*⁸⁸ (also a hundred miles away from the convention), suggest preplanning and coordination to accomplish all this within the time it happened. Further investigation might confirm or refute the Judge's involvement, as above speculated, but not within the time confines of this thesis.

The other two interwar appeals were, first, *Commonwealth v. Crook* (1927), which affirmed the conviction of the Richmond and Portsmouth professional baseball teams and umpires of the game on question for playing on Sunday. From a close reading, however, it is clear that this one case seemingly supporting the closing law, differing in that way from most of the other interwar cases, was actually no different. *Pirkey* had ruled that the jury,

⁸⁶(...continued)

with Conference delegates in Lynchburg until later than his jury-instruction rulings). It would be difficult for anyone, except the Judge himself, even by telephone, to advise anyone at the Methodist Conference about just what had occurred in the Hanover trial and what the Judge had ruled. His rulings on the record did not prohibit Sunday beer sales without exception. The first public notice of such a ruling was in his January 19, 1942, "Opinion of the Court" (Ex "C," 22-34, especially 27), not issued until three months after the trial. The details of this minor trial were unlikely to be known by anyone at the conference on October 18, without the Judge's elaboration of them.

⁸⁷ See n. 9, **Chapter 8**, *supra*, and accompanying text.

⁸⁸ See n. 84, this **Chapter**, *supra*, and accompanying text.

generally speaking, must decide if the Sunday labor was excused by the statute's "necessity" exemption. *Crook* followed that rule,⁸⁹ and the jury found for the prosecution. However, the *Pirkey* case, under which the jury decision was allowed, recognized that there could be inconsistent rulings by differing jury panels on the same facts.

Finally, the closing law "charity" exemption, as explained in the commentary of this thesis on *Williams v. Commonwealth* (1942),⁹⁰ allowed a business, to possibly (and paradoxically) better its overall financial return under the closing law by donating its Sunday net profits to charity. An additional irony was that the closing law, in this way, came close to being stood on its head: It was being used to encourage Sunday employment instead of its purported purpose of allowing that day as a rest for laborers.

In retrospect, the controversies and confusions that once dominated public discourse and litigation concerning Sunday closing laws, may provide insights to cautiously draw from a review of these once hotly-contested and now quiet, or at least quiescent, controversies. The first cautious insight is, that an absence of a strongly-felt public need for a statute ostensibly guiding public conduct, like the Sunday closing law, tends to result in disuse of the statute for its intended purpose, even though it nominally remains on the books. To sanction its repeal requires, to the inward mind, perhaps, some explanation about why it is no longer

⁸⁹ 147 Va. at 597.

⁹⁰ See n. 108, Chapter 7, *supra*, and Chapter 7(b)(5) herein, *supra*.

followed, a discussion the public might just as soon not undertake. So nothing is said, and all concerned hope nothing more comes of it, without actually taking action, such as repealing its provisions, to formally bring its influence to an end.

This is often not the end of the matter, however. The ancient adage that “the devil finds work for idle hands to do,”⁹¹ applies in a secular sense to idle statutes as well. When a statute, ostensibly intended to improve human behavior, becomes “idle” because it is deemed by the public, and hence by enforcement officials the public selects, as no longer appropriate for its intended use; it can be used by others to commit mischief for personal advantage. Such improper use can range from a business person seeking to hurt another’s business for commercial advantage to a crank seeking to tar a defendant with a criminal record for engaging in conduct equally practiced by many others without penalty.

The development of the Sunday closing law is a convenient vehicle through which to observe such conduct, since the time has passed when it was enforced with any regularity, yet the memories of such times are still fixed in many minds. It stands as a warning that any such statute, intended for the good of the citizenry, if not widely supported, can well become a tool of favoritism for the few. That is among the reasons the title of this thesis speaks of the “troubled” intersection of Christ and Commerce.⁹² Tracing the closing law’s

⁹¹ Derived from the writings of St. Jerome, see *Oxford Dictionary of Proverbs*, 70, n. 4, **Chapter 3**, *supra*.

⁹² “Christ” is used here as a metaphor for the public desire to foster in secular society the Christ-like virtue of a day of rest and reflection for its working members, while avoid-
(continued...)

development from earliest times to the present era of appellate-court opinions, it would not be out of bounds for many to conclude from the review herein of such opinions, that precious little benefit was obtained for either alternative, Christ or Commerce, through the operations of such laws, when viewed in a Virginia microcosm.

The statute's objective of enforcing a uniform day of rest was undercut, in the first place, by a series of statutory exemptions from prosecutions, such as for "furnaces, kilns, plants and other businesses" that "may" be "necessary to be conducted on Sunday."⁹³ Large businesses, therefore, and their equally large numbers of employees, effectively escaped the closing law. The public could observe additional amendments further restricting the closing law's force such as, in 1932, "sale of gasoline, or any motor vehicle fuel, or any motor oil . . ."⁹⁴ This both provided another significant exemption from the Sunday closing law and a means, through the fuel sales, for additional long-range Sunday travel for the public in general, leading to more Sunday commercial activities, also violating the closing law, due to that travel.

In addition, the statutory opening of the exemption door appeared to encourage the Virginia Supreme Court to join the legislature in expanding the "necessity" and "charity"

⁹²(...continued)

ing constitutionally undue deference to the Christian religion's claims on Sunday as a day of worship.

⁹³ Va. Code §4570, as amended; quoted in *Francisco*, 180 Va. at 374-375.

⁹⁴ Ibid, amendment contained in Va. Acts of 1932, c. 328, p. 596.

closing law exemptions, as additional escapes from its enforcement. In this way the closing law, designed to reduce the incidents of sabbath work, was seemingly used, to the contrary to do just the opposite, increasing the amount of such Sunday work. From this can be generalized a third insight derived from the history of Virginia's closing law as it operated in the real world: The public's view of a statute designed to improve human behavior, but not popularly supported and consequently falling into disuse, becomes encrusted with cynicism when business ostensibly affected by it use their influence with governmental authorities to avoid whatever rigor the statute retained.

Thus, closing laws were trending towards being used either without reference to, or contrary to, their intended purposes, leading to their final extinction in 1988.⁹⁵ This ultimate *denouement* was after the 1942 end-point of this thesis. Crystalization of that conclusion, however, could be surmised from the trends and tendencies described in this thesis.

⁹⁵ *Benderson Development Co., Inc. v. Sciortino*, 236 Va. 136, 150, 372 S.E.2d 751 (1988) (“[The record discloses] the local-option feature and the fact that over half the population of the Commonwealth has utilized it to escape the law’s effects entirely; . . . repeated acts of the General Assembly creating additional and broader exemptions . . . and . . . prosecutions only on ‘private complaint.’ [N]one of these steps was in itself improper . . . , but . . . their combined effects have reduced the application of a general law to the kind of special legislation prohibited by Article IV, section 14 and 15 of the Virginia Constitution [(1971)].”)(Note that two of the features of *Francisco*, a *de facto* “private complaint” by the husband of the store owner competing with the defendant, and a form of “local option” through the Board of Supervisors’ ability to control Sunday beer sales, in somewhat different form, became part of the basis for ultimately finding the closing law unconstitutional in 1988, as above quoted in *Sciortino*, *ibid.*)

BIBLIOGRAPHY

(a) Archives and Manuscripts.

Leon Maurice [Nelson] Bazile Papers, 1826-1967, MSS1 B33483 a FA2 (Richmond: Virginia Historical Society, accessioned December 14, 1987) ("*Bazile Papers*" or "*Papers*")

- Letter, Leon M. Bazile to Virginia Hamilton Bowcock, July 21, 1917.
- Letter, Leon M. Bazile to Virginia Hamilton Bowcock, July 24, 1917.
- Letter, Virginia Hamilton Bowcock to Leon M. Bazile, July 31, 1917.
- Draft Letter, Hon. Leon M. Bazile to U.S. Attorney General, November 20, 1941 (plus typescript of same) (**Attached Exhibits "F" and "F-1"**).
- Letter, Albert O. Boschen, Virginia House of Delegates, to Hon. Leon M. Bazile, December 28, 1941 (*Bazile Papers*)(**Attached Exhibit "G"**).

Letter, William R. VanderKloot to Sumpter Priddy, April 16, 2002 (countersigned by addressee) (**Attached Exhibit "H"**).

(b) Appellate Court Briefing and Records on Appeal .

Commonwealth v. Loving, Record No. 6163 (from duplicate filings at Univ. of Richmond Law Library). Opinion reported at 206 Va. 924 (1966).

- **Record** [on appeal], filed November 4, 1965 (From duplicate Virginia Supreme Court filings at the University of Richmond Law Library).

Lakeside Inn Corp. v. Commonwealth, Record No. 6453 (Richmond: Virginia Supreme Court). Opinion reported at 134 Va. 696 (1922)

- "Petition for Writ of Error" [by trial-Defendant Lakeside Inn];
- "Brief on Behalf of the Commonwealth."

M. G. Francisco v. Commonwealth, Record No. 2633 (Richmond, Virginia Supreme Court). Opinion reported at 180 Va. 371 (1942).

- "Petition for Writ of Error [by Trial-Defendant Francisco]," filed September 16, 1942 (**Attached Exhibit "C"**).
- "Brief on Behalf of the Commonwealth," filed , October 8, 1942(**Attached Exhibit "D"**).

Pirkey Bros. v. Commonwealth, Record No. 1616 [renumbered 6516](Richmond: Virginia Supreme Court) Opinion reported at 134 Va. 713 (1922).

- Petition for Appeal [by trial-Defendants Pirkey];
- Brief on Behalf of the Commonwealth;
- “Reply Brief,” by Petitioner-Defendants Pirkey Bros.

(c) Hanover County [Virginia] Clerk’s Office, Circuit Court Documents.

Common Law Order Book No. 19, Hanover Circuit Court (June 8, 1939 - November 20, 1944)

- Page 214, December 30, 1941, Order Appointing J.Z. Johnson as County Supervisor (**Attached Exhibit “E”**).
- Page 379, September 20, 1943, *nolle prosequi* [dismissal] of *Francisco* by prosecutor (**Attached Exhibit “J”**).

“Hanover Criminal Docket, May 1942,” (**Attached Exhibit “I”**).

(d) Published Documents.

American State Papers, Foreign Relations, Documents, Legislative and Executive of the Congress of the United States (Washington, D.C.: Gales and Seaton, 1832), vol. 2.

Appendix, Debates and Proceedings in the Congress of the United States, containing Important State Papers and Public Documents and all the Laws of a Public Nature, 5th Congress (May 15, 1797 to March 3, 1799) (Washington, D.C.: Gales & Seaton, 1851) (“*State Papers*”), vol. 1.

Arnold, Benedict, November 27, 1775 [account of military operations in Canada], *March to Quebec, Journals of the Members of Arnold’s Expedition*, rev. ed., Kenneth Roberts, compiler and annotator, (Garden City, N.Y.: Doubleday, 1947).

Barlow, Joel, *Advice to the Privileged Orders in the Several States of Europe. Resulting from the Necessity and Propriety of a General Resolution in the Principle of Government* (1792); reprint, Ithaca, N.Y.: Cornell Univ. Press, 1956), quoted in *One Nation Under Law: America’s Early National Struggles to Separate Church and State*, Mark Douglas McGarvie (DeKalb, Ill.: Northern Ill. Univ. Press, 2004).

Basler, Roy P. ed., *The Collected Works of Abraham Lincoln*, 8 vols. (New Brunswick, N.J.:

Rutgers Univ. Press, 1953)

- 2:465-466, “‘A House Divided’: Speech at Springfield, Illinois,” June 16, 1858 (extract);
- 3:522, 523, 530-531, “Address at Cooper Institute, February 27, 1860” (extract).

Boyd, Julian P., ed., *Papers of Thomas Jefferson* (Princeton: Princeton Univ. Press, 1950), vol. 2; (“*Jefferson’s Papers*”).

Declaration of Independence (1776).

Dunlop, William, *Diary of, 1766-1829*, Collections of the New York Historical Society, New York, quoted in *James Kent: A Study in Conservatism, 1763-1847* (New York: D. Appleton-Century for the American Historical Ass’n, 1939; reprint, De Capo Press for The American Scene, Comments and Commentators, Wallace E. Farnham, gen. ed., 1969).

Hening, William Waller, ed., *The States at Large; being a Collection of the Laws of Virginia, from the First Session of the Legislature in the Year 1619, Published Pursuant to an Act of the General Assembly of Virginia* (13 vols., various publishers, 1819 - 1823; Facsimile Reprint, Jamestown Foundation of the Commonwealth of Virginia by Univ. Press of Virginia, Charlottesville, 1969) (“Hening”).

Vol. I.	(1619-1660)	(New York: R. & W. & G. Bartow, 1823).
Vol. II.	(1660-1682)	(New York: R. & W. & G. Bartow, 1823).
Vol. III.	(1684-1710)	(Phildelphia: Thomas Desilver, 1823).
Vol. V.	(1738-1748)	(Richmond: Franklin Press, 1819).
Vol. IX.	(1775-1778)	(Richmond: J. & G. Cochran, 1821).
Vol. XII	(1785-1788)	(Richmond: George Cochran, 1823).

Jefferson, Thomas, “Bill for Establishing Religious Freedom,” *The Constitution and Religion: Leading Supreme Court Cases on Church and State*, Robert S. Alley, ed. (Amherst, N.Y.: Prometheus, 1999)

_____, “Freedom of Religion at the University of Virginia,” October 7, 1822, *The Complete Jefferson*, Saul K. Padover, [ed.] (New York: Duell, Sloan & Pearce, 1943).

_____, *Notes on the State of Virginia* (1785), Frank Shuffleton, ed. (New York: Penguin Books, 1999) (paperback).

- Johnson, Sen. Richard M., Chair, Committee on Post Offices and Post Roads, Report [on Sunday Observance and Delivery of Mail], January 19, 1829, 20th Congress, 2d Session, Senate Report No. 74, *The Debates and Proceedings in the Congress of the United States with an Appendix Containing Important State Papers and Public Documents and All the Laws of a Public Nature; Index*, 42 vols. (Washington, D.C.: 1834-1856); Reprint, *Annals of America*, Mortimer J. Adler, ed. (Chicago: Encyclopaedia Britannica, 1976), 5: 284, 285 ("Johnson, *Annals*").
- Journal of the House of Delegates of Virginia* (Richmond: Thomas W. White, 1827), 143-144, January 16, 1786.
- Journal of the Senate . . . of Virginia* (Richmond: Thomas W. White, 1827), 92, January 16, 1786.
- Lipsomb, Andrew A. and Albert Ellery Bergh, *The Writings of Thomas Jefferson*, 20 vols. (Washington, D. C.: Thomas Jefferson Memorial Ass'n, 1904-1905), vol. 15.
- Madison, James, "Memorial and Remonstrance," 1785, *The Constitution and Religion: Leading Supreme Court Cases on Church and State*, Robert S. Alley, ed. (Amherst, N.Y.: Prometheus, 1999).
- _____, *Annals of Congress*, 4th Congress, 1st sess., V, April 6, 1796, quoted in *Original Intent and the Framers's Constitution*, Leonard W. Levy (New York: Macmillan, 1988).
- Miller, Hunter, ed., *Treaties and other International Acts of the United States of America*, 5 vols. (Washington, D.C., 1931), vol. 2.
- "Revisors' Notes," *Code of Virginia* (Richmond: David Bottom, Spt.of Public Printing, 1919), 2 vols. 2:1871 ("Sunday and Sabbath day are synonymous terms").
- Rules of the Supreme Court of Virginia (2004)* (Mathew Bender/Lexus-Nexus).
- Rutland, Robert A. and William M. E. Rachal, ed., *Papers of James Madison*, 17 vols. (Chicago: Univ. of Chicago Press, 1973) ("*Madison Papers*").
- Shepard, Samuel, *The Statutes at Large of Virginia: from October Session 1792 to December session 1806, inclusive, in three volumes (new series) being a continuation of Henning* (Richmond, Va: 1835; reprint, New York: AMS Press, 1970), vol. 1.

United States Code (Washington: U.S. Gov't Printing Office, 2000) ("Official" (2000), ed.)
(*Historical Note*, following 28 U.S.C. §1652).

The United States of America, The Senate, Journal, The Executive Proceedings (Washington, D. C.: Duff Green, printed by Senate order, 1828), vol. 1.

Ver Steeg, Clarence L. and Richard Hofstadter, ed., *Great Issues in American History: From Settlement to Revolution*, "An Ordinance and Constitution of the Virginia Company in England for a Council of State and General Assembly," ¶ 4, July 24, 1621, vol. 1 (New York: Vintage Books/Random House, 1969).

Virginia Court Rules and Procedure-State (Thompson-West 2005).

(e) Constitutional and Statutory Provisions.

U.S. Const., art. 1, § 8, cl. 3; art. 2, § 2, cl. 2.

U.S. Const., amend. I; amend. V, cl. 2; amend. XIV.

§ 34, Federal Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73 (original "Rules of Decision Act").

28 U.S.C. §1652 (current "Rules of Decision Act").

Va. Const. (1776), art. I; art. VII.

Va. Const. (1971), art. IV, §§ 14, 15.

Va. Code, ch. 196, §§ 16, 17 (Patton & Robinson rev., 1849).

Va. Code Ann. (1887) §§ 3799; 3801.

Va. Code Ann. (1919) §§ 136; 4570; 5962.

Va. Code Ann. (1950) §§ 18-329; 57-1.

Va. Acts 1889-90, c. 49.

Va. Acts 1916, c. 751.

Va. Acts 1932, c. 328 .

Va. Acts 1938, c. 129.

Va. Acts 1954, c. 131.

Va. Acts 1960, c. 267; c. 358.

(f) Published Appellate Opinions.

(1) United States Supreme Court.

Bucher v. Cheshire R.R., 125 U.S. 555, 582 (1888).

Braunfeld v. Brown, 366 U.S. 599 (1961).

Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

Cohens v. Virginia, 19 U.S. [1 Wheat.] 264 (1821).

Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961).

Hing v. Crowley, 113 U.S. 703, 710 (1885).

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Loving v. Virginia, 388 U.S. 1 (1967), *reversing, sub nom.*, *Commonwealth v. Loving*, 206 Va. 924, 147 S.E. 2d 78 (1966).

Marbury v. Madison, 5 U.S. [1 Cranch] 137 (1803).

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816).

McGowan v. Maryland, 360 U.S. 420 (1962).

Murchison, In re, 349 U.S. 133 (1957).

Powhatan Steamboat Co. v. Appomattox R.R., 65 U.S. [24 How.] 247 (1860).

Richardson v. Goddard, 64 U.S. (23 How.) 28, 41 (1859).

Rosenberger v. University of Virginia, 515 U.S. 819, 822 (1995).

Scott [(Dred)] v. Sanford, 60 U.S. (19 How.) 393 (1857).

Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

Wheaton v. Peters, 33 U.S. 591 (1834).

Zorach v. Clauson, 343 U.S. 506 (1961).

(2) **Virginia Supreme Court and other Virginia Appellate Opinions.**

Benderson Development Co., Inc. v. Sciortino, 236 Va. 136, 372 S.E.2d 751 (1988).

Chesapeake & Ohio R.R. v. Williams, 108 Va. 689, 690, 62 S.E. 796 (1908).

Commonwealth v. Gaines, 2 Va. Cas. 172, 180, 3 Va. Rpts. Ann. 188, 192 (Va. Gen. Ct., 1819).

Commonwealth v. Loving, 206 Va. 924, 147 S.E. 2d 78 (1966), *rev'd, sub nom.*, Loving v. Virginia, 388 U.S. 1 (1967).

Commonwealth v. Perrow, 124 Va. 805, 811, 97 S.E. 820 (1919).

Crook v. Commonwealth, 147 Va. 593, 136 S.E. 565, 50 A.L.R. 1043 (1927).

Ellis v. Commonwealth, 122 Va. 821, 94 S.E. 154 (1917).

Ewing v. Haas, 132 Va. 215, 111 S.E. 255 (1923).

Francisco v. Commonwealth, 180 Va. 371, 23 S.E.2d 234 (1942).

Hanger v. Commonwealth, 107 Va. 872, 60 S.E. 67 (1908).

Hill v. Commonwealth, 43 Va. (2 Gratt.) 595, 693 (1845).

Hortenstein v. Virginia Carolina R.R., 102 Va. 914, 47 S.E. 996 (1904).

Lakeside Inn Corp. v. Commonwealth, 234 Va. 696, 114 S.E. 769 (1922).

Mandell v. Haddon, 202 Va. 979, 988, 121 S.E.2d 516 (1961).

Morris & Co. v. Alvis, 138 Va. 149, 164-165, 121 S.E. 145 (1924).

Norfolk & Western R.R. v. Commonwealth, 93 Va. 749, 24 S.E. 837 (1896).

Novak v. Commonwealth, 20 Va. App. 373, 389, 457 S.E.2d 410 (1995).

Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S.E. 769 (1922).

Perry v. Commonwealth, 44 Va. (3 Gratt.) 602 (1846).

Snodgrass v. Commonwealth, 89 Va. 679, 687, 17 S.E. 238 (1893).

Wells v. Commonwealth, 107 Va. 834, 57 S.E. 588 (1907).

Williams v. Commonwealth, 179 Va. 741, 20 S.E.2d 493 (1942).

(3) Other Jurisdictions.

Andrews, *Ex parte*, 18 Cal. 679, 684 (1861).

Arrigo v. Lincoln [(City of)] 154 Neb. 537, 48 NW2d 643, 648 (1950).

Benderson Development Co., Inc. v. Sciortino, 236 Va. 136, 150, 372 S.E.2d 751 (1988).

Caldor's, Inc. v. Bedding Barn, Inc., 177 Conn. 304, 417 A.2d 343, 346 (1979).

Carroll v. Staten Island R.R., 58 N.Y. 126 (1874).

Connecticut [(State of)] v. Anonymous (1976-7), 33 Con. Supp. 56, 364 A.2d 244, 246 (Common Pleas, 1976).

Gallen v. State, 156 Md. 459, 144 Atl. 350, 353 (1920).

Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97, 98-99 (1925).

Gretchel [(Wisconsin ex rel)] v. Bradish, 95 Wis. 205, 70 N.W. 172 (1897).

Johnson v. Town of Irsasburgh, 42 Vt. 23 (1874).

Martin v. Hunter's Lessee, 14 U.S. [1 Wheat.] 304, 351 (1816).

McGrath v. Merwin, 112 Mass. 467, 468-469 (1873).

Newman, *Ex parte*, 9 Cal. 502, 506, 507 (1858).

Opsahl v. Judd, 30 Minn. 126, 14 N.W. 575, 576 (1883).

Parker v. Latner, 60 Maine 528, 531 (1872).

People v. Ruggles, 8 Johns 290, 294, 295 (N.Y., 1811).

Playtogs Factory Outlet, Inc. v. County of Orange, 57 App. Div. 772, 379 NYS2d 859, 867 (1976) (*dissenting opinion*).

Updegraf v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).

Van Auken v. Chicago & Western Mich. R.R., 69 Mich. 307, 55 N.W. 971, 974 (1893).

Whelden v. Chappel, 8 R.I. 230, 233 (1874).

Wilcox v. Supreme Council of Royal Arcanum, 210 N.Y. 223, 111 S.E. 255 (1923).

(g) Newspapers.

Religious Herald, Richmond, Virginia

- December 16, 1920, Editorial, “The State and the Sabbath,” 1, Dr. R.H. Pitt, editor.
- December 23, 1920, [response to above editorial], Dr. R.H. Pitt, editor, 10-11.
- January 6, 1921, H.R. Pollard, Richmond City Atty’s Office, response to Dr. R. H. Pitt, “Sound Doctrine,” 5.

Richmond News-Leader, Richmond, Virginia

- October 18, 1941, 1, “Bazile Beer Ban Hailed by Methodists.”
- October 18, 1941, 12, “Bazile Will Hear Argument on Blue Law Beer Verdict.”
- December 7, 1942, 1 “Sunday Sale of Beer Held Not Illegal [by Supreme Court].”

Richmond Times-Dispatch, Richmond, Virginia

- October 18, 1941, 1, 10, “Hanover Verdict Bans Sale of Sunday Beer as Blue Law Violation . . .,” by Staff Writer Overton Jones.
- October 18, 1941, 1, “Berlin Finds Kearny Attack, Arms Debate ‘Interesting.’”
- October 19, 1941, 1, 16, “Methodists Praise Ruling on Beer Ban.”

(h) Articles.

Buckley, Thomas E., S.J., “After Disestablishment: Thomas Jefferson’s Wall of Separation in Antebellum Virginia,” *J. of Southern History* 61(3)(1995): 445-480.

Clark, Charles E., "Special Problems in Drafting and Interpreting Procedural Codes and Rules," *Vanderbilt L. Rev.*, 3(1950):493-508.

Dreisbach, Daniel L., "Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New light on the Jeffersonian Model of Church-State Relations," *North Carolina L. Rev.*, 69 (1990): 159-211.

King, Andrew J., "Sunday Law in the Nineteenth Century," *Albany L. Rev.* 64(2000): 675-772.

Kirkland, Frederick R., ed., "Journal of a Physician on the Expedition against Canada, 1776," *Pennsylvania Mag. of Hist. & Biog.*, 59 (Oct. 1935): 325, quoted in, *1776, Year of Illusions*, Thomas Fleming (New York: Norton, 1975) .

Stadtmauer, Marc A., "Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause," *Cardozo Arts & Entertainment L. J.*, 12(1994):213-236.

Wallenstein, Peter, "Never on Sunday: Blue Laws and Roanoke, Virginia," *Virginia Cavalcade*, 43 (1994)(3):132-143.

- Ibid., 138, **Attached Exhibit "A"**, Motion Picture Announcement, *Breathless*, Jean Harlow and William Powell, Roanoke, Virginia (1935).
- Ibid., 135, **Attached Exhibit B"**, Lakeside Inn pool and patrons, Roanoke, Virginia, in the 1920s.

(i) Books.

Abraham, Henry J. and Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States*, 6th ed. (New York: Oxford Univ. Press, 1994).

Achelis, Elizabeth, *Of Time and Calendar* (New York: Thomas Nelson, 1944), in *Space Age Sunday*, Hiley Ward (New York: Macmillan, 1960).

Allen, Frederick L., *The Big Change* (New York, Harper & Bros., 1952).

Archer, Elizabeth, *Of Time and Calendar* (New York: Thomas Nelson, 1955), quoted in Hiley H. Ward, *Space Age Sunday* (New York: Macmillan, 1960).

- Bailey, Thomas A., *The Diplomatic History of the American People*, 10th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1980).
- Bailyn, Bernard, *To Begin the World Anew: the Genius and Ambiguities of the American Founders* (New York: Knopf, 2003).
- Bemis, Samuel Flagg and Grace Gardner Griffin, *Guide to the Diplomatic History of the United States, 1775-1921* (Washington, D.C., U.S. Gov't Printing office for the Library of Congress, 1935; reprint, Gloucester, Mass.: Peter Smith, 1963).
- Brueggemann, Walter, "Commentary, Exodus 20:8-11," *New Interpreters Bible* (Nashville: Abbingdon Press, 1994).
- Buckley, Thomas E., S.J., *Church and State in Revolutionary Virginia, 1776-1787* (Charlottesville: Univ. Press of Virginia, 1977).
- Cameron, Euan, s.v. "Henry VIII," *Oxford Companion to British History*, Cannon, John, ed., (Oxford: Oxford Univ. Press, 1997).
- Cantor, Norman F., *Imagining the Law: Common Law and the Foundations of the American Legal System* (New York: HarperCollins, 1999).
- Colcord, Willard A., ed., rev. ed., *American State Papers Bearing on Sunday Legislation*, William A. Blakely, Compiler and Annotator (Washington, D.C.: General Conference Corporation of Seventh-Day Adventists, 1911; reprint, De Capo Press, 1970).
- Cooley, Thomas M., *Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union*, 5th ed. (Boston: Little, Brown, 1883) ("Constitutional Limitations").
- Cooley, Thomas M., *Treatise on the Constitutional Limitations* (6th ed. 1890), quoted in "Sunday Blue Laws," Andrew J. King, *Albany L. Rev.*, 64 (2000):675-772.
- Danzig, A. and P. Brandwein, ed., *The Greatest Sports Stories from the New York Times* (New York: A.S. Barnes & Co., 1951), "The Golden Age of Sport, 1920-1930."
- Dreisbach, Daniel L., "Religion and Legal Reforms in Revolutionary Virginia," *Religion and Political Culture in Jefferson's Virginia*, Garrett Ward Sheldon and Daniel L. Dreisbach, ed. (Lanham, Md.: Rowman & Littlefield, 2000).

- Dunne, Gerald T., s. v., "Joseph Story," (vol. 1). *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions*, Leon Friedman and Fred L. Israel, ed. (New York: Chelsea House/R.R. Browker Co., 1969) (4 vols.).
- Durant, Will and Ariel, *The Story of Civilization, The Age of Reason Begins*, vol. 7 (New York: Simon & Schuster, 1961).
- Ellis, Joseph L., *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1998).
- Esposito, Vincent, ed., *West Point Atlas of American Wars, 1689-1900*, vol. 1 (New York: Praeger, 1959; reprint: Henry Holt, 1995)(unpaginated).
- Eusebius, "The Life of the Blessed Emperor Constantine," quoted in Philip Schaff and Henry Ware, ed., *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, Philip Schaff and Henry Ware, ed. (New York: Christian Literature Co., 1890), quoted in, Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977).
- Ford, Arthur L., *Joel Barlow* (New York: Twayne, 1971).
- Fretheim, Terence E., "Commentary, Genesis 1:1-2.3, The Creation," *New Interpreter's Bible* (Nashville: Abington Press, 1994).
- Gates, Sir Thomas, *For the Colony In Virginia Brittania: Lawes Divine, Morall and Martiall* (London: William Strachey, 1612), quoted in Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977).
- Green, E. Tyrell, *The Thirty-Nine Articles and the Age of Reformation* (London, 1896), quoted in Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977).
- Hessey, James A., *Sunday: Its Origin, History, an Present Obligation* (London: 1866), quoted in Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977).
- Hitchcock, Eugene W., Jr., ed., *The Bill of rights: Original Meaning and Current Understanding*, (Charlottesville: Univ. Press of Virginia, 1991).

- Hohner, Robert A. *Prohibition and Politics: Life of James Cannon, Jr.* (Columbia, S.C.: Univ. of South Carolina Press, 1999) (eBook)
- Horton, John Theodore, *James Kent: A Study in Conservatism, 1763-1847* (New York: D. Appleton-Century for the American Historical Ass'n, 1939; reprint, De Capo Press for The American Scene, Comments and Commentators, Wallace D. Farnham, gen. ed., 1969).
- Howe, Mark De Wolfe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: Univ. of Chicago Press, 1965), quoted in Daniel L. Dreisbach, "Religion and Legal Reforms in Revolutionary Virginia, *Religion and Political Culture in Jefferson's Virginia* (Lanham, Md.: Rowman & Littlefield, 2000).
- Irwin, Ray W., *The Diplomatic Relations of the United States with the Barbary Powers, 1776-1816* (Chapel Hill, N.C.: Univ. of N. Carolina Press, 1931).
- Jackson, Samuel Macauley, ed., *New Schaff-Herzog Encyclopedia of Religious Knowledge* (New York: Funk & Wagnalls, 1911), cited in Hiley H. Ward, *Space Age Sunday* (New York: Macmillan, 1960).
- Johnson, Herbert Allen, s. v., "John Marshall" (vol. 1). *The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions*, Leon Friedman and Fred L. Israel, ed. (New York: Chelsea House/R.R. Browker Co., 1969) (4 vols.).
- Kennedy, David M., *Freedom from Fear: The American People in Depression and War, 1929-1945*, vol. 9, *The Oxford History of the United States*, C. Vann Woodward, gen'l ed., (Oxford: Oxford Univ. Press, 1999).
- Kyving, David E., *Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence, Kan.: Univ. Press of Kansas, 1996).
- Le Glay, Marcel, et al., *A History of Rome*, 2d ed. (Malden, Ma./Oxford: Blackwell, 2001).
- Lehman, Hartmut, "Preface," *Weber's Protestant Ethic: Origins, Evidence, Contexts*, Hartmut Lehman and Kenneth F. Ledford, ed., (Cambridge: Cambridge Univ. Press, 2000) ("Evidence").
- Levy, Leonard W., *Original Intent and the Framers's Constitution* (New York: Macmillan, 1988), quoting James Madison from *Annals of Congress*, 4th Congress, 1st sess., V, April 6, 1796.

- Levy, Leonard W. and Kenneth Karst, ed. *Encyclopedia of the American Constitution*, 2d ed., (New York: MacMillan Reference USA [Gale Group, 2000]).
- Liddell-Hart, B.H., *Strategy* (New York: Praeger, 1955).
- Lotz, Wilhelm P. F. F., "Sabbath," *New Schaff-Herzog Encyclopedia of Religious Knowledge*, Samuel Macauley Jackson, ed., (New York: Funk and Wagnalls, 1911), cited in *Space Age Sunday*, Hiley H. Ward (New York: Macmillan, 1960).
- Lund, Sister Candida, "Religion and Commerce, The Sunday Closing Cases," *The Third Branch of Government: 8 Cases in Constitutional Politics, a Harcourt Casebook in Political Science*, Herman Pritchett and Alan F. Westin, ed. (New York: Harcourt, Brace & World, 1963).
- MacKinnon, Malcolm H., "The Longevity of the Thesis: A Critique of the Critics," *Weber's Protestant Ethic: Origins, Evidence, Contexts*, Hartmut Lehman and Kenneth F. Ledford, eds. (Cambridge: Cambridge Univ. Press, 1993) ("Evidence").
- McCrossen, Alexis, *Holy Day, Holiday: The American Sunday* (Ithaca, N.Y.: Cornell Univ. Press, 2000).
- Mersky, Roy M., s.v. "Publishing Law." ed., *Oxford Companion to American Law*, Kermit Hall, chief ed. (New York: Oxford U. Press, 2002).
- Metzger, Bruce M. and Michael D. Coogan, ed., *Oxford Guide to Ideas & Issues of the Bible* (New York: Oxford Univ. Press, 2001).
- Michie's Jurisprudence of Virginia and West Virginia*, vol. 1B (Charlottesville: Michie Law Press, 1996), "Appeal & Error" § 267, pp. 480, 482.
- Middleton, Richard, *Colonial American: History, 1585-1776*, 2d ed. (Malden, Mass: Blackwell, 1997).
- Miller, Perry, "Religion and Society in the early Literature of Virginia," in *Errand in the Wilderness* (Cambridge: Harvard Univ. Press, 1956), quoted in *Redeem the Time: The Puritan Sabbath in Early America*, Winton U. Solberg (Cambridge: Harvard Univ. Press, 1977).
- Morgan, Edmund S., *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975, paperback ed., 1995).

- O'Day, Rosemary, *Longman Companion to the Tudor Age* (New York: Longman, 1995).
- Page, Thomas M., *The Old Dominion: Her Making and Her Manners* (New York: Charles Scribners & Sons, 1914), quoted in *Redeem the Time: The Puritan Sabbath in Early America*. Winton U. Solberg (Cambridge: Harvard Univ. Press, 1977).
- Peterson, Merrill D., *Thomas Jefferson and the New Nation: A Biography* (New York: Oxford Univ. Press, 1970).
- Pfeffer, Leo, "Sunday Closing Laws," *Encyclopedia of the American Constitution*, 4 vols., Leonard W. Levy and Kenneth Karst, eds. (New York: MacMillan, 1984), vol. 4.
- Pierson, George Wilson, *Tocqueville in America* (New York: Oxford, 1938; reprint, Baltimore: Johns Hopkins Univ. Press, 1996 [paperback]).
- Randall, Willard Sterne, *Benedict Arnold: Patriot and Traitor* (New York: Wm. Morrow, 1990).
- Reichley, A. James, *Religion in American Public Life* (Washington, D.C.: Brookings Institution, 1985).
- Robert, General Henry M., *Robert's Rules of Order Revised* (Chicago: Scott-Forseman, 1943).
- Robert, Henry M. III, *The Scott Forseman Robert's Rules of Order, Newly Revised* 9th ed. (n.p.: Scott Forseman, 1990).
- Rybczynski, Witold, *Waiting for the Weekend* (New York: Viking Penguin, 1991).
- Sanford, Charles B., "The Religious Beliefs of Thomas Jefferson." *Religion and Political Culture in Jefferson's Virginia*, Garrett Ward Sheldon and Daniel L. Dreisbach, ed. (Lanham, Md.: Rowman & Littlefield, 2000).
- Schaff, Philip and Henry Ware, ed., *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church* (New York: Christian Literature Co., 1890), cited in *Space Age Sunday*, Hiley H. Ward (New York: Macmillan, 1960).
- Sedgewick, Theodore, *A Treatise on the Rules which Govern the Interpretation of Statutory and Constitutional Law* (New York: John S. Voorhies, 1857) ("Constitutional Interpretation").

- Smith, Richard A., s. v. "Coke, Sir Edward," and "Mansfield, William Murry, 1st earl of." ["Lord Mansfield"], *Oxford Companion to British History*, Cannon, John, ed., (Oxford: Oxford Univ. Press, 1997).
- Soggin, J. A., s. v. "Sabbath," *Oxford Guide to Ideas & Issues of the Bible*, Bruce M. Metzger and Michael D. Coogan, ed. (New York: Oxford Univ. Press, 2001).
- Story, Joseph, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray & Co., 1833), 3 vols, ("Commentaries"), vol 1.
- Sica, Alan, "Rationalization and Culture," *Cambridge Companion to Weber*, Stephen Turner, ed. (Cambridge: Cambridge Univ. Press, 2000).
- Soggin, J. A., "Sabbath," *The Oxford Guide to Ideas & Issues of the Bible*, Bruce M. Metzger and Michael D. Coogan, ed. (New York: Oxford Univ. Press, 2001).
- Solberg, Winton U., *Redeem the Time: The Puritan Sabbath in Early America* (Cambridge: Harvard Univ. Press, 1977) ("Solberg").
- Speake, Jennifer, ed., *Oxford Dictionary of Proverbs*, 4th ed. (Oxford: Oxford Univ. Press, 2003).
- Story, Joseph, *Commentaries on the Constitution of the United States*, 3 volx. (Boston: Hilliard, Gray & Co., 1833), vol. 1 ("Commentaries").
- Tocqueville, Alexis [Charles Henri Clérel] de, *Democracy in America*, translated and edited by Harvey C. Mansfield and Delba Winthrop (Chicago: Univ. of Chicago Press, 2000).
- Treese, Joel D., ed., *Biographical Directory of the American Congress, 1774-1996* (Alexandria, Va.: CQ Staff Directories, Inc., 1997) ("Biographical Directory of Congress").
- Uminowicz, Glenn, "Recreation in a Christian America: Ocean Grove and Asbury Park, New Jersey, 1869 - 1914," *Hard at Play: Leisure in America, 1840-1940*, Kathryn Grover, ed. (Amherst, Mass.: Univ. of Massachusetts Press; and Rochester, N.Y.: The Strong Museum, 1992).

- Walzer, Michael, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (Cambridge: Harvard Univ. Press, 1965), quoted in *Redeem the Time: The Puritan Sabbath in Early America*, Winton U. Solberg (Cambridge: Harvard Univ. Press, 1977).
- Ward, Hiley H., *Space Age Sunday* (New York: Macmillan, 1960).
- Weber, Max, *The Protestant Ethic and the Spirit of Capitalism*, trans., Talcott Parsons (New York: Charles Scribner's Sons, 1958) ("PE").
- Weldon Cooper Center for Public Service, *Virginia Statistical Abstract (2000)*, (Charlottesville: Univ. of Virginia, 1999).
- Woodress, James, *A Yankee's Odyssey: The Life of Joel Barlow* (New York: Greenwood, 1958).
- World Almanac Books, *1999 World Almanac and Book of Facts* (Mahwah, N.J.: World Almanac Books, 1999)(Consumer Price Indexes).
- Zaret, David, "The Use and Abuse of Textual Data," *Webster's Protestant Ethic: Origins, Evidence, Contexts*, Hartmut Lehman and Kenneth F. Ledford, ed., (Cambridge: Cambridge Univ. Press, 2000).

BIOGRAPHICAL INFORMATION

William R. VanderKloot was born in Detroit, Michigan, in 1937. He received a B.A. in 1958 from the University of Michigan in Ann Arbor, Michigan, and an L.L.B. in 1961 from the University of Virginia School of Law in Charlottesville, Virginia. He served as a first lieutenant in the United States Army Intelligence Corps (1961-1963) and as an Assistant Prosecuting Attorney in the Oakland County Prosecutor's Office, Pontiac, Michigan (1964-1966).

Mr. VanderKloot has been a member of the State Bar of Michigan since 1961, and was engaged there in the private practice of law from 1966 through 1999 in the Cities of Birmingham and Bloomfield Hills. He was also a member of the Oakland County Bar Association and received that Association's Distinguished Service Award in 1991 for co-chairing its Committee evaluating judicial candidates. He has published articles in professional legal journals and has tried many cases, and briefed and argued many appeals, in Michigan courts. He was active in the State Bar of Michigan, where he was a member of its Civil Procedure Committee, and Chair of that Committee in 1986. He was also admitted to the Illinois bar, where he is now on retired status, and to the Sixth United States Court of Appeals in Cincinnati, Ohio.

Mr. VanderKloot and his wife, Keitha, moved, upon his retirement from active law practice, to Richmond, Virginia, in 1999, where he continues to perform legal research and drafting for other attorneys.

SIGNATURE PAGE

The signature below by undersigned certifies his completion of the preceding Thesis, entitled:

**THE TROUBLED INTERSECTION OF THE INTERESTS OF CHRIST
AND COMMERCE: APPELLATE-COURT REVIEW OF VIRGINIA
SUNDAY CLOSING LAWS IN HISTORICAL OVERVIEW
THROUGH 1942**

The Thesis is submitted to the Graduate Faculty of the University of Richmond, in Candidacy for the degree of Master of Arts in History in August, 2005.

Undersigned further certifies that he has at all times adhered to all the requirements of the Honor Code of the University of Richmond in the preparation of this Thesis, without plagiarism or any other wrongdoing.

Respectfully submitted,

WILLIAM R. VANDERKLOOT

Dated: July 21, 2005

APPENDIX —ATTACHED EXHIBITS

<u>Ex.</u>	<u>Description</u>	<u>First Page of Discussion in Text</u>
ALL PHOTOREDUCED, EXCEPT EXHIBIT "F-1"		
"A"	Motion Picture Announcement: <i>Breathless</i> , Jean Harlow & William Powell, Roanoke, Virginia (1935).	119, n. 110
"B"	Photograph, Lakeside Inn pool and patrons, Roanoke, Virginia, in the 1920s.	131, n. 141
"C"	M.G. Francisco v. Commonwealth, <i>Petition for Writ of Error</i> [by Defendant], filed September 16, 1942, Virginia Supreme Court [" <i>Petition</i> "].	135, n. 3
"D"	M.G. Francisco v. Commonwealth, <i>Brief on Behalf of the Commonwealth</i> , filed October 8, 1942, Virginia Supreme Court.	135, n. 4
"E"	Hanover Circuit Court, Common Law Order Book No. 19, page 214, Appointment of Joseph Johnson as County Supervisor, December 30, 1941.	138, n. 3
"F"	November 20, 1941, Draft Hon. Leon M. Bazile letter to Attorney General (hand written by the Judge).	141, n. 18
"F-1"	Typescript copy of above Exhibit "F" (tabbed under Exhibit "F" , following that handwritten copy).	141, n. 18
"G"	Albert O. Boschen, Delegate, December 28, 1941, letter to Hon. Leon M. Bazile.	143, n. 22
"H"	Author's April 16, 2002, letter to Sumpter Priddy, countersigned by him.	144, n. 24
"I"	Hanover County Criminal Docket, May 1942.	171, n. 106
"J"	Hanover Circuit Court, Common Law Order Book No. 19, Page 379. Edward Simpkins, Commonwealth Attorney, <i>Nolle Prosequi, Francisco v. Commonwealth</i> , September 20, 1943.	177. n. 125

Cover Sheet for

Exhibit “A”

Motion Picture Announcement for Movie *Breathless*

Jean Harlow and William Powell

Roanoke, Virginia (1935)

Poster Programmed for Charitable Sunday Movie Exhibition

(Courtesy of the Historical Society of Western Virginia, Roanoke)

First Page of Discussion of the Exhibit in Thesis Text:

Page 119, footnote 110

Right: For Sunday shows, the American Theatre carefully noted which causes, such as a local war-veterans' chapter, benefited from the extra day of movies.

at the door but requested that, once inside, they consider "a silver offering" for the benefit of the Pastors' Aid Society of the Fifth Avenue Presbyterian Church. Mr. Hunter freely stated that he had indeed assisted in arranging the Sunday performances, that such shows had occurred any number of times during the preceding two years to assist one charitable organization or another, and that even the city manager had given his approval to the most recent show. Clearly not everyone in authority, and certainly not all the city's pastors, opposed Sunday movies.

Meanwhile, S. G. Richardson still awaited the outcome of his seven appeals. Usually, the appeals would not have accumulated and some early resolution might have been expected. But the hustings court judge, J. Lindsay Almond, Jr., was ill, and his replacement declined from the outset to become embroiled in potentially volatile Sunday-closing cases. Commenting on the confused state of affairs, the *Roanoke Times* observed that "the principle of local option appears to prevail in North Carolina, whereas in Virginia no way is provided by law for allowing the people of a community to express themselves." As a result, "we have here in Roanoke the unedifying spectacle of Sunday movies ruled illegal by the Police Court for six or seven consecutive weeks, an appeal noted to a higher court, and a motion picture theatre continuing to open its doors Sunday after Sunday, with no disposition in any quarter apparently to press the issue and get the thing settled definitely one way or the other."

At last, in late May 1935, Virginia governor George C. Peery stepped in and appointed a Lynchburg judge to hear the case. Various witnesses argued both sides of the question whether the theater could remain open under the law's "necessity" or "charity" exclusions. Each side claimed that if it won, the court decision would no doubt enhance the moral tone of the Roanoke community. After considering the evidence, the five-man jury could not agree on a verdict. Three members voted to convict; two disagreed. At a second trial in July, however, Richardson finally won acquittal.

The *Roanoke Times* again took the occasion to editorialize on Sunday-closing laws. On 19 July 1935, the editor remarked that the issue seemed settled, so that "in future motion picture theatres of the city can

throw open their doors on Sunday for performances without hindrance by the authorities." Not even the pretense of a charitable purpose would be required any longer. "Sunday movies," he added, "are not a necessity, in the strictest sense of the word, but neither are they objectionable." More to the point, "if there is any considerable sentiment in the community in favor of them, we can see no objection to their operation. Certainly the trend generally seems to be in that direction and Roanoke cannot be looked upon as a crossroads village."

Perhaps not, but the newspaper also warned its readers that the decision regarding Sunday movies was "not to be interpreted as a blanket permission for a 'wide open' Sabbath." Movies might be acceptable, "but when it comes to certain other forms of commercial amusement on the Sabbath there is just one thing to be said, and that is 'No.'" But commercial entertainment had already made inroads: the Lakeside company—coincidentally just two days after the *Roanoke Times* cautionary editorial—was thirteen

Cover Sheet for

Exhibit “B”

1920's Photo of Lakeside Inn Pool

**Subjected to Virginia Supreme Court Closing Law Appeal
in *Lakeside Inn Corp v. Commonwealth*, 134 Va. 136 (1922)**

Roanoke, Virginia (early 1920s)

(Courtesy of the Historical Society of Western Virginia, Roanoke)

First Page of Discussion of the Exhibit in Thesis Text:

Page 131, footnote 141

EXHIBIT

B

Virginia Cavalcade
43(1994):132-143, 135.



Above: When the Lakeside park opened in 1920 it was the first time Roanoke-area residents had been able to use a swimming pool rather than local creeks and rivers for splashing about. The park also offered other attractions including an orchestra for dancing.

inter 1994

EXHIBIT

B

Cover Sheet for

Exhibit “C”

Defendant Francisco’s *Petition for Writ of Error* (“*Petition*”)

For Virginia Supreme Court Closing Law Appeal

in *Francisco v. Commonwealth*, 180 Va. 371 (1942)

Hanover County, Virginia (1942)

Contains Complete Trial Transcript

First Page of Discussion of the Exhibit in Thesis Text:

Page 135, footnote 3

EXHIBIT
C

Supreme Court of Appeals of Virginia
at Richmond

M. G. FRANCISCO

v.

COMMONWEALTH

... FROM THE CIRCUIT COURT OF THE COUNTY OF HANOVER

RULE 14.

§5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

EXHIBIT
C

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2633

M. G. FRANCISCO

versus

COMMONWEALTH

EXHIBIT

C

EXHIBIT

C

..... PETITION FOR WRIT OF ERROR.

*To the Honorable Justices of the Supreme Court of Appeals
of Virginia:*

Your petitioner, M. G. Francisco, respectfully represents that he is aggrieved by a final judgment entered against him by the Circuit Court of Hanover County on the 16th day of March, 1942, in the case wherein the Commonwealth was the plaintiff and your petitioner was the defendant. A transcript of the record of the case is filed herewith.

THE PROCEEDINGS IN THE LOWER COURT.

Petitioner was indicted on the charge of unlawfully laboring at his trade or calling, otherwise than in a work of necessity or charity, on Sunday, in violation of Section 4570 of the Code of Virginia, the specific charge being that he "did keep open and maintain on the said Sunday a business 2* for the sale of beer, and did on said Sunday sell beer."

He pleaded not guilty to the charge. The case was tried by a jury on October 17, 1941. The sale of the beer on Sunday was admitted by the petitioner, and the jury, on a manda-

Supreme Court of Appeals of Virginia

tory, or finding, instruction given by the court for the Commonwealth, found petitioner guilty and fixed his punishment at a fine of five dollars. A motion was made to set aside that verdict as being contrary to the law and the evidence, and for misdirection of the jury by the court, which motion was overruled, and judgment was entered by the Court against petitioner, in accordance with the jury's verdict, on March 16, 1942, for reasons stated in writing and made a part of the record. It is to that judgment that petitioner now seeks a writ of error.

THE QUESTION INVOLVED.

The question involved in the case is: Did the sale of beer on Sunday by the petitioner constitute a work of necessity within the meaning of Section 4570 of the Code of Virginia? The next primary question is: Is the answer to the first question one of fact for the jury to decide, or one of law for the court? The incidental questions involved concern the correctness of the court's action in refusing all of the instructions asked for by the petitioner, and in refusing to admit as evidence certain testimony offered by the petitioner.

3* STATEMENT OF FACTS.

M. G. Francisco was a country merchant operating a general store in Hanover County, Virginia, at which he sold general merchandise, gasoline and oil, cigarettes, cigars, and tobacco, soft drinks, sandwiches, beer and wine. He had the necessary licenses to do all of these things. He had been in business for about ten years. He did not operate his general merchandise business on Sundays, but did sell gasoline and oils, cigarettes and tobacco, soft drinks and ice cream, and beer and wine, on that day. He did this openly on Sunday, September 7th, 1941, and had done so for a long time prior thereto.

On this particular Sunday, two men, who were sent into the store by a County policeman for the purpose, each bought a bottle of beer. It was for the business of operating his store and making these sales that Francisco was convicted. There was no question about disorderly conduct or of the store having been improperly run. In fact the Sheriff of the County, who was known to Mr. Francisco, was in the store at the time the sales were made and had been there for an hour. He himself, purchased some soft drinks and ice cream (R., p. 121).

M. G. Francisco v. Commonwealth

R. K. Turner, the Inspector for the Virginia Alcoholic Beverage Control Board for Hanover County, testified that there were 61 licensed establishments in Hanover County; that of his own knowledge, 80 per cent of them were engaged in selling beer on Sunday; and that he did not know how many more were doing so.

4* Six or more persons, who operated filling stations and restaurants at various places on the highways leading through the County, testified that they regularly sold beer on Sundays, there being 25 or 30 such places on No. 1 Highway alone (R., p. 58) and that the travelling public demanded it.

It further appeared from the evidence that throughout the County generally, restaurants, filling stations and the like, habitually sold such articles as beer, wine, soft drinks, cigars, cigarettes and tobacco to the local trade, picnickers, tourists and the travelling public on Sundays.

5* ASSIGNMENTS OF ERROR.

It is submitted that the trial court erred in the following particulars, namely:

1. In refusing to set aside the verdict of the jury as being contrary to the law and the evidence.

2. In holding that the sale of beer by the petitioner constituted a violation of section 4570 of the Code of Virginia as a matter of law.

3. In giving to the jury Instruction No. 1 at the request of the Commonwealth (R., p. 128) and an unnumbered verbal instruction by the court (R., p. 124).

4. In refusing to give to the jury Instructions Nos. 2, 3, 4, 5, 6, 7, 8, 11 and 11-A, all requested by petitioner (R., pp. 128 to 133).

5. In refusing to admit the evidence of C. W. Taylor, Clerk of the Board of Supervisors of Hanover County, to the effect that a resolution prohibiting the sale of beer in Hanover County on Sunday had been offered for adoption by the Board at a meeting thereof held on July 1, 1941; (R., pp. 114-115) that delegations both in behalf of and in opposition to the adoption of the resolution appeared before the Board; and that the Board did not adopt it.

6*

*ARGUMENT.

The pertinent part of the statute involved, Section 4570 of the Code of Virginia, is as follows:

"If a person on a Sunday be found laboring at any trade or calling . . . except in household or other work of necessity or charity, he shall be deemed guilty of misdemeanor . . ."

The trial court held that the work engaged in by petitioner was not a work of necessity as a matter of law, and gave the following instructions to the jury:

Instruction No. 1: The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused, M. G. Francisco, did keep open and maintain on Sunday the 7th of September in Hanover County a business for the sale of beer and did on said Sunday sell beer, they should find him guilty and fix his punishment at a fine of not less than five dollars (R., p. 128).

Verbal Instruction: "That is what the instruction tells you gentlemen, that the only question involved is, do you believe from the evidence beyond a reasonable doubt that Mr. Francisco sold beer on Sunday. Now, if you believe from the evidence beyond a reasonable doubt that he sold beer on Sunday, then you must find him guilty, and five dollars will be a sufficient fine to be fixed" (R., p. 124).

ASSIGNMENTS 1, 2, AND 3.

Since assignments of error, Nos. 1, 2, and 3 all challenge the correctness of the court's holding and in giving these two instructions they will be discussed together.

It is submitted that this case is controlled by the cases of *Pirkey Brothers v. Commonwealth*, 134 Virginia 713, and *Lakeside Inn v. Commonwealth*, 134 Virginia 696 *and 7* that under the principles therein laid down, the question involved in the case was one of fact for the jury and not of law for the court.

In the *Pirkey Brothers* case, the defendants were charged with laboring at their trade or calling in that they operated Weyer's Cave and that the said work was not one of necessity or charity. There the evidence was submitted to a jury, and on its verdict of guilty a judgment was entered. On appeal, this court did not declare that the operation of the

EXHIBIT

4

EXHIBIT

C

cave was not a necessity as a matter of law, but on page 731, it said: "We are unable to say that the verdict of the jury, approved by the trial court, is erroneous, and in such cases the statute requires us to affirm the judgment of the trial court."

Before reaching this conclusion, however, the court discussed the question of what constitutes a "necessity" within the meaning of the law, at length, and held among other things:

1. That the issue is one of fact to be determined by juries who reflect a community opinion of moral fitness and propriety (p. 722).

2. That the word "necessity" cannot be construed to mean the same thing now as it did when the original act was passed in 1779. The word is elastic and relative and must be construed with reference to the conditions under which we live (p. 722).

3. That the necessity meant is not a physical or absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case (p. 723).

4. That no fixed and unvarying definition of "necessity" as used in the statute can be given, "but what may be a necessity in one place may not be in another, and every case must stand on its own peculiar facts (p. 723).

5. "Laws setting aside Sunday as a day of rest are upheld not from any right of government to legislate for the promotion of religious observance, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent to the laborers in our factories and workshops, and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

"These expressions, however, while clearly condemning labor on Sunday, and advocating the observance of the day a day of rest, convey but little idea of how that rest is to be taken. The courts have held many things to be works of necessity under existing conditions of society, and have condemned many more, but have been unable to formulate any rule of universal application. 37 Cyc. 552, et seq.; 25 R. C. L., pp. 1418-1423. Under these circumstances, with no fixed rule for our guidance, we find no other course to pursue than to apply to the statute the same rules of construction that

are applied to other statutes. *The statute should have a reasonable construction* so as to promote the end for which it was enacted, and thus cover every class of labor at every trade, calling or other business not excepted by the statute. The statute should also be construed in the light of the age in which we live, recognizing the fact that there are things which the community regard as necessary that were not necessities when the statute was first enacted; that to escape the penalty pronounced by the statute, the labor performed must be of the class excepted by the statute, or recognized by the community as a necessity, and that what is or is not a necessity is generally a question of fact for the jury and not one of law for the court. There are cases where the question is one of law for the court. Where the act done is plainly a violation of the statute, as where a contractor, without emergency, is running a steam shovel on Sunday, or the act is plainly one of necessity, as where the owner lifts his ox out of the ditch; in either case, the question is one of law for the court. But if the act be one about which fairminded men might reasonably differ as to whether or not it is a work of necessity, then it is a question of fact for the jury. If it be objected that this leaves the question unsettled, 9* "with nothing for future guidance, and that different juries may reach different results on the same evidence, we can only reply that this is true of all questions of fact and is especially noticeable in criminal cases and cases involving questions of negligence" (italics supplied). (1. 725.)

The most recent case decided by the Virginia Court of Appeals is that of *Russell L. Williams v. Commonwealth*, decided on June 8th, 1942, (not yet reported).

It is significant that the opinion in the Williams case entirely ignores the case of *Ellis v. Covington*, (122 Va. 821), which was so earnestly relied upon by the Judge of the Trial Court in the instant case.

Williams v. Commonwealth involved the charged violation of Section 4570 in that Williams, as the manager of two theatres in Farmville, operated them on Sunday in accordance with an agreement with the Woman's Club that the net proceeds of the theatres from the Sunday performances would be given to the Club to be used for charitable purposes.

On page 3 of the opinion, Mr. Justice Gregory, speaking for the Court, says:

"There have been three Virginia cases in which our stat-

EXHIBIT C

EXHIBIT D

ute has been construed: *Pirkey Brothers v. Commonwealth*, 134 Va. 713, 114 S. E. 764; *Lakeside Inn v. Commonwealth*, 134 Va. 696, 114 S. E. 769 and *Crooks v. Commonwealth*, 147 Va. 593, 136 S. E. 565. However, these cases considered only works of 'necessity' and not works of 'charity'.

"In the *Pirkey Bros.* case the question for decision was whether it was a violation of the statute to keep open a cave on Sunday where an admission fee was charged. The case was submitted to a jury on the question of necessity and a conviction followed. This Court affirmed the judgment of the trial Court. Judge Martin P. Burks, speaking for the Court said that "no fixed and unvarying definition of 'necessity' as used in the Statute can be given," that the issue must be decided by the juries in the respective localities who are selected for their fitness and who will reflect the community opinion of the moral fitness and propriety of the work. Judge Burks said:

"We cannot however, agree with the few courts that hold that the word 'necessity' must be construed to mean the same thing now as it did when the original act was passed in 1779. Many things that were deemed luxuries then, or had no existence at all, are now deemed necessities. For example, street railways, telegraphs and telephones. The word is elastic and relative, and must be construed with reference to the conditions under which we live, and yet the elasticity must not be extended so far as to cover that which is not needful but simply desirable, and thereby defeat the manifest purpose of the statute to set apart Sunday as a day of rest from ordinary labor. *State v. James*, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277.

"In an early Massachusetts case (*Flugg v. Millbury*, 4 Cush. 243), it was said that the necessity meant was not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case.

"It was held that the burden of proof was upon the Commonwealth to prove that the work done was not a work of necessity, or that it was not a work of charity. The burden of proving every element of the offense was placed upon the Commonwealth."

"The *Lakeside Inn Corp.* case followed very closely the *Pirkey Bros.* case and the principles of the former were applied in the latter where the question was whether keeping open on Sunday a swimming pool was a work of necessity. This Court reversed the judgment of the lower court on in-

structions, and on the failure of the lower court to admit certain material evidence. In the course of the opinion, Judge Burks said:

"Preliminary to this discussion, it may be stated that if what is done by one is justified under the statute as a necessity, then the labor which is thereby entailed on another as a necessary incident is likewise justified. Hence we need only inquire as to the necessity of the act entailing the consequent labor, for without the labor the act could not be done. As pointed out in the Pirkey Bros. Case, the necessity meant by the statute is not a physical necessity, but a moral fitness or propriety of the work and labor done under the circumstances of the particular case, and whether or not the act in question is morally fit and proper is usually a question of fact to be determined by a jury after hearing the testimony relevant to that particular act, and receiving proper instructions from the court, upon request, as to the proper interpretation of "necessity" as used in the statute. It is the function of the court to interpret the statute, but when this has been done, it is usually the function of the jury, as the representative of the morality of the community, to determine "the moral fitness or propriety of the work" in question."

On page 8 the Court instructed as follows:

"The Court instructs the jury that a 'work of charity as used in the statute means that the work itself must be charitable; that if the defendant was working at his usual trade and calling which itself was not charitable, and was receiving consideration for such work, even though the net proceeds of the result of his labor are given to charity, he has violated the Statute, unless the jury shall believe that the accused was engaged in a work of necessity as defined in the other instructions."

It will be noted that the Trial Court in the Russell Williams case fell into a similar error as did the Judge of the Circuit Court of Hanover, in that he gave a finding instruction which took the determination of the question of "charity" out of the hands of the jury, and was in violation of those principles so clearly enunciated by Judge Burks in the Pirkey and Lakeside cases.

The foregoing principles having been so clearly stated, we confess that we are unable to comprehend how the learned Judge of the trial court arrived at the conclusion he did in the instant case. It may be, however, that he was unduly

impressed with the alcoholic contents of the product that was sold, for in the very first sentence of his opinion, which will be found commencing on page 5 of the clerk's transcript of the record, he says: "The accused was indicted for the sale 13* of 'beer on Sunday.'" Of course, he was mistaken in this. The accused was not so indicted. He was indicted for laboring at a trade or calling on Sunday. It is no crime to sell beer, as such, on Sunday, and from a strictly legal standpoint, the fact that in this instance the article sold was beer does not put the case on any different basis than if that article had been near-beer, or any other soft drink, which the public might consider to be a necessity.

It further appears from his opinion that he bases his conclusions largely upon the authority of *Ellis v. Covington*, 122 Virginia 821, and *Hanger v. Commonwealth*, 107 Virginia 872, the latter having been decided in 1908, fourteen years before the Pirkey Brothers case, and the former in 1917, five years before.

It, therefore, behooves us to examine these two cases with care. In the *Ellis* case, coca-cola was sold on Sunday and the sale was made in 1916, over twenty-five years ago. In that case, there was no jury trial, the jury having been waived and the questions of law and fact were both submitted to the court, who found the accused guilty. This court, in its opinion, did not discuss the question of what is a work of necessity and what is not, or whether that question is one of law for the court, or one of fact for the jury, or whether what is or is not a necessity remains static and is the same at all places and under all conditions, or whether it may vary with the times, places and conditions. 14* But in an opinion of less than a page in length, merely affirmed the judgment of the trial court, which, as stated, acted as both judge and jury, and whether the question was decided as a matter of law or as a matter of fact, does not appear.

We, therefore, submit that the *Ellis* case is authority for nothing, except that it was unlawful to sell coca-cola in the town of Covington a quarter of a century ago. Certainly the times and conditions have changed considerably since that day, but notwithstanding this, if the trial court be sound in its opinion, in the instant case, then it follows that it is unlawful to sell a coca-cola or other soft drinks on Sunday anywhere in the State as a matter of law. We know that there are many seaside resorts, and recreational parks and community centers, which have been established both by the government and by private enterprise, which are visited every Sunday by throngs of tourists and picnickers and at which

EXHIBIT

C

EXHIBIT

C

soft drinks are regularly sold. If such sales be unlawful, as a matter of law, then judges, prosecuting attorneys and other law-enforcement officers are knowingly "winking" at law violations all over the State.

It will be noted that the case of *Russell L. Williams against the Commonwealth* (*supra*) not only ignores the *Ellis v. Covington* case but sustains our position that the law which controls is that laid down in *Pirkey Brothers v. Commonwealth* and in *Lakeside Inn v. Commonwealth*, in that the question as to whether or not the work is a work of necessity should be submitted to a jury.

15* "In *Hanger v. Commonwealth*, *supra*, the main question involved was the forfeiture of a charter of a social club on a *quo warranto* proceedings, and the entire opinion of the court was devoted to a discussion of the law with respect thereto. It is true that in the course of the opinion the court said that "the pretended organization of a social club was for the fraudulent purpose of securing the privilege of selling tobacco, cigars, cigarettes, soda-water, and other soft drinks on Sunday—privilege which an individual could not exercise without incurring the forfeiture in Section 3799 of the Code (new section 4570)" but this seems to have been conceded for the purposes of that case. At any rate there was no discussion as to the proper construction of the "Sunday Law" and no principles of law with respect thereto were enunciated.

All that we have just said with respect to the *Ellis* case might be repeated here with respect to the *Hanger* case. At best, it merely held that the sale of tobacco, soft drinks, etc., in the City of Portsmouth in the year 1908—34 years ago—was unlawful. Furthermore, if anything had been said in the *Hanger* case which was in conflict with the *Pirkey Brothers* case, decided in 1922, (and there was not), it would have been overruled by the later case, which specifically holds that merely because a thing may not have been a necessity at one time or at one place, it does not follow that the same thing may not be a necessity at another time or at another place. That this statement is true, we know not only

16* from the *Pirkey* case but also from our general knowledge and experience. We know that at various times in the past it was not considered necessary to kiss one's wife, or to prepare a hot meal, or to publish a newspaper, or to operate a freight train on Sunday. Yet all of these things are now regarded as necessary or proper.

Likewise, we do not think this court will hold that because the sale of soft drinks in Portsmouth in the year 1908 was not a necessity, it follows as a matter of law that their sale

now anywhere in the State is still not a necessity. In 1908 people stayed at home on Sunday. In 1942 they drive all over the State, and to say that on such trips they could not lawfully purchase soft drinks for themselves and their children would work a hardship indeed.

Further in the opinion of the trial Judge, he quotes the following extract from *Pirkey Brothers v. Commonwealth*, *supra*:

"* * * There are cases where the question is one of law for the Court. Where the act done is plainly a violation of the statute, as where a contractor, without emergency, is running a steam shovel on Sunday, or the act is plainly one of necessity, as where the owner lifts his ox out of the ditch; in either case, the question is one of law for the Court. But if the act be one about which fair-minded men might reasonably differ as to whether or not it is a work of necessity, then it is a question of fact for the jury."

He then draws the conclusion that because the Supreme Court of Appeals in the *Ellis* case held that the sale of coca-cola in Covington in 1916 was not a work of necessity, then

no fair-minded man can differ on the question of whether 17* or not "the sale of beer in Hanover County in 1941 is a work of necessity. In view of all of the other principles, with respect to the word "necessity" being elastic and relative and its meaning varying with the time, place, etc., which were so clearly announced in the very case from which the above extract is taken, we submit that merely to state the conclusion drawn is sufficient proof of its fallacy.

It is submitted that the sale of beer does not come within the category of a contractor operating a steam shovel, for fair-minded men do differ on the question of whether or not the former is a necessity. If all fair-minded men thought it was not a work of necessity, it would be unlawful to sell beer on Sunday anywhere in the State, yet it is being sold openly. The Alcoholic Beverage Control Board, which is supposed to be composed of fair-minded men, permits it to be sold on Sunday in all places, except in those places in which local ordinances prohibiting such sales have been adopted. The General Assembly of Virginia, likewise supposed to be composed of fair-minded men, in 1938 passed an act (Acts 1938, p. 194) giving to the Board of Supervisors the authority to adopt ordinances prohibiting the sale of beer on Sunday in their respective Counties. If fair-minded men did not differ, and if it were conceded that the sale of beer on Sunday violated Section 4570 of the Code, why, may we ask,

EXHIBIT
CEXHIBIT
C

should the General Assembly give to the Board of Supervisors the power to declare an act, that was already unlawful under the general law, to be unlawful!

18* The full text of the Act of 1938 is as follows:

"Be it enacted by the General Assembly of Virginia, That the board of supervisors or other governing body of each county shall have authority to adopt ordinances effective in that portion of such county not embraced within the corporate limits of any city or incorporated town, and the council or other governing body of each city and town shall have authority to adopt ordinances effective in such city or town, prohibiting the sale of beer and wine, or either beer or wine, between the hours of twelve o'clock post meridian of each Saturday and six o'clock ante meridian of each Monday, or fixing hours within said period during which wine and beer, or either, may be sold, and prescribing fines and other penalties for violations of such ordinances which shall be enforced by proceedings in like manner and with like right of appeal as if such violations were misdemeanors. Provided, however, that such ordinances shall not effect the sale of beer and wine on passenger trains or steam vessels while operating in interstate commerce.

"Upon the adoption of any such ordinance a copy thereof, duly certified by the clerk of the governing body adopting the same shall be transmitted to the Virginia Alcoholic Beverage Control Board, and thereafter every retail license issued by said board for the sale of beer and wine or either of them in the county, city or town in which such ordinance was adopted, shall be limited in accordance with the provisions of such ordinance. Upon receipt of the record of the conviction of any licensee of the board for the violation of any such ordinance, the board may, in its discretion, suspend or revoke such license.

"It is further provided, however, that no provision herein contained, nor any ordinance that may be passed in pursuance thereof, shall be construed as in any way altering, amending or repealing section forty-five hundred and seventy of the Code of Virginia."

This Act is referred to, and the proviso embraced in the last paragraph thereof is quoted, in the opinion of the trial Judge. In commenting thereon he says that if section 4570 of the Code did not prohibit the sale of beer, pursuant to one's trade or calling, then there would have been no necessity for this proviso, and that: "Of necessity, the General Assembly must have concluded that Section 4570 of the Code

prohibited the sale of wine and beer on Sunday and that 19* it was, by chapter 129 of the Acts of 1938, merely giving to the localities the authority to parallel the existing State law. . . . He then likens the Act to the various statutes enacted during the prohibition era permitting localities to adopt ordinances paralleling the State laws, so that such localities could collect the fines, and intimates or concludes that this Act was adopted for the same purpose.

All of this appears to us to be far-fetched, indeed. We think that it is much more logical to say that if Section 4570 of the Code already prohibited the sale of beer as a matter of law, then it was an absurdity to pass the Act of 1938, for there is certainly nothing in it to indicate that it was passed as a revenue measure to enable the localities to collect money through the imposition of fines. Again, if the General Assembly had intended merely to permit the localities to adopt a parallel ordinance to section 4570 of the Code, it could have done so in so many words, as it did do in the case of the prohibition statutes, referred to by the trial Judge.

Is it not much more logical to say that the proviso was placed in the Act because of the holding of the court in the Pirkey Brothers case? It will be remembered that it was there held that what is or is not a necessity is one of fact to be determined by juries who reflect the community's opinion of the moral fitness and propriety of the act, and that what may be a necessity in one place may not be in another.

Under this holding a jury in Hanover County might 20* say that "the sale of beer is not a work of necessity, in which case it would follow that such a sale would be unlawful under section 4570 of the Code. On the other, the jury might say that it is a work of necessity, in which case the sale would not be unlawful under that section. Then, if that jury did not truly reflect the community's opinion, that opinion could be reflected by the adoption of a local ordinance by the Board of Supervisors, making the sale unlawful, regardless of the action of the jury. In other words, each locality is now given two opportunities to express the community's opinion of the moral fitness and propriety of selling beer on Sunday, one through its juries and the other through its duly elected representatives, whereas it had only one prior to the passage of the Act of 1938.

In this same connection we would like to make another pertinent observation. When the entire Act is read, it will be seen that by the express terms thereof the local authorities are given the power, not only to prohibit the sale of beer between the period from Saturday night to Monday morning, but also to fix the "hours within said period during which

EXHIBIT

C

EXHIBIT

C

wine and beer, or either, may be sold." It therefore follows that if the trial Judge's conclusion be sound, then the General Assembly is placed in the absurd position of attempting to confer upon the local authorities the power to declare an act to be lawful, which it, the General Assembly, knows is unlawful under the general law.

21* "For the reasons above assigned, it is respectfully submitted that the question of whether or not the sale of beer on Sunday by petitioner was a work of necessity was a question of fact for the jury and that the court erred in holding that it was one of law.

ASSIGNMENT OF ERROR NO. 4.

The court was requested to give to the jury on behalf of the petitioner nine instructions, all of which were refused. The first seven of them are as follows:

Instruction No. 2:

The Court instructs the jury that the purpose of the law in prohibiting work from being done on Sunday is to give to the public a rest from its customary labor for the benefit of both the moral and physical nature of mankind, and not for the purpose of enforcing the beliefs or tenets of any religious creed or denomination (R., p. 128).

Instruction No. 3:

The Court instructs the jury that the burden of proof is on the Commonwealth to establish beyond a reasonable doubt that the defendant in the operation of his business sold on Sunday beer as alleged to have been sold in the indictment, and that the labor and business in so doing were not a work of necessity or charity, and unless the Commonwealth has met this burden, they should find the defendant not guilty (R., p. 129).

Instruction No. 4:

The Court instructs the jury that if they find from the evidence that the keeping open by the defendant of his place of business on Sunday, and the sale therein of the beer as alleged in the indictment tended to promote the reasonable recreation, and necessary convenience of the travelling public, and that the premises where said business was transacted were kept in an orderly and quiet manner, and that the work

EXHIBIT

C

EXHIBIT

C

therein done was morally fit and proper to be done on Sunday, then they may find that the work of conducting such filling station for the purposes outlined, is necessary within the meaning of the statute and they should find the defendant not guilty (R., p. 129).

Instruction No. 5:

The Court instructs the jury that a work of necessity as meant by the Statute of Virginia, is not a physical and absolute necessity, but a moral fitness or propriety of the work or labor or act done under the circumstances of each particular case (R., p. 130).

Instruction No. 6:

The Court instructs the jury that the question of whether the act of keeping the defendant's place of business open and selling beer on Sunday was a work of necessity within the meaning of the Statute, is a question of fact for the jury, and in deciding that question the jury may consider the manner in which the premises and the business connected therewith were run, the effect which the opening of the place and the sale of beer therefrom has on the good order and moral welfare of the community, and whether or not it tends to the orderly and moral recreation of the public (R., p. 130).

Instruction No. 7:

The Court instructs the jury that if they find from the evidence that the opening of the defendant's place of business and the sale therefrom of beer on Sunday, is a public necessity within the meaning of the Statute, then the defendant should be found not guilty (R., p. 131).

Instruction No. 8:

The Court instructs the jury that there is no fixed or unvarying definition of the word "necessity", but on the other hand, it is an elastic and relative word and one that must be construed in the light of the conditions under which we live at the present, and not in the light of the past, for many things that were considered luxuries then, or even had no existence at all, are now considered necessities (R., p. 131).

It is submitted that the foregoing instructions, numbered from 2 to 8, inclusive, state correctly the principles of law

which are applicable to the facts in this case and should have been given to the jury under the authority *of the cases of *Pirkey Brothers v. Commonwealth*, and *Williams v. Commonwealth* (supra).

The next two instructions which were offered by petitioner and were refused are as follows:

Instruction No. 11:

The Court instructs the jury that by an act of the General Assembly of Virginia, passed at the 1934 Session there was created the Alcoholic Beverage Control Board with power to issue to retailers in the State of Virginia licenses for the sale of beer and wine, and pursuant thereto said Board has proceeded to issue to the retailers in Virginia, including the defendant, such licenses without any restriction therein as to sales on Sunday; further that by a further act of the General Assembly passed in 1938 the Board of Supervisors of the several counties in Virginia were empowered to pass ordinances to prohibit the sale of wine and beer on Sunday, which act provided that nothing therein should be construed as altering, amending or repealing Section 4570 of the Code (commonly known as the Sunday blue law).

Further the Court tells the jury that it appears from the evidence that since the passage of the Act of 1938 application has been made to the Board of Supervisors of Hanover County to pass an ordinance prohibiting the sale of beer and wine in Hanover County on Sunday, but regardless of its power to do so the Board of Supervisors refused to pass such ordinance and that there is in existence in Hanover County no ordinance of said Board which prohibits the sale of beer and wine on Sundays (R., p. 131).

Instruction No. 11-A:

The Court instructs the jury that under the laws of Virginia since the year 1938, the Board of Supervisors of Hanover County has had the authority to adopt an ordinance (effective outside of the Town of Ashland) specifically making it unlawful to sell beer and wine in the County, although the statute conferring that power upon the Board of Supervisors further provides that nothing therein contained, nor any ordinance adopted by the Board of Supervisors in pursuance thereof, shall be construed as in any way changing or repealing the law generally known as the "Sunday" law, under which this prosecution is had (R., p. 133).

EXHIBIT
C

EXHIBIT
C

24* "In the *Pirkey* case, Judge Burks said that the question as to whether or not the work was "a work of necessity" as contemplated by the statute, should be submitted to a jury "who are selected for their fitness and who will reflect the community opinion". It was therefore essential not only that the court permit the introduction of evidence of the action of the Board of Supervisors but also that the court instruct the jury that the Board of Supervisors of Hanover County had the power under the statute to enact a local ordinance to allow or to prohibit the sale of beer on Sunday, and also that a petition had been filed with the Board seeking to prohibit such sale and the Board had refused to take action thereon. Had this been done the jury would have been in a position to exercise their duties as the reflectors of public opinion.

The action of the court in giving the finding instruction above, prevented this.

25* *ASSIGNMENT OF ERROR NO. 5.

At the trial of the case, petitioner called C. W. Taylor, Clerk of the Board of Supervisors of Hanover County, as a witness in his behalf, but the court refused to admit his testimony as evidence. The evidence that he would have given if he had been allowed to testify will be found in transcript of evidence, page 114 of Record, and is as follows:

"Q. Mr. Taylor, you are now and were the Clerk of the Board of Supervisors of Hanover County on July 1, 1941?

"A. Yes, sir.

"Q. Did you attend the meetings of the Board of Supervisors held on July 1, 1941?

"A. Yes, sir.

"Q. Please state whether or not the question of the adoption of an ordinance prohibiting the sale of beer in Hanover County came before the Board for its consideration at that time.

"A. It did.

"Q. Please state whether or not there were delegations before the Board in behalf of and in opposition to that ordinance.

"A. There were.

"Q. Please state what action, if any, was taken by the Board of Supervisors after the hearing on that matter or that day.

"A. A resolution was offered by Mr. Thompson prohibit

ing the sale of beer and wine in Hanover County on Sunday, which received no second and was lost.

"Q. I will ask you if you will file a certified copy of the minutes to which you refer in the record.

26° "A. Yes."

We submit that this testimony is relevant and material as tending to show the community opinion of the moral fitness and propriety of the act involved, and should have been admitted in evidence before the jury, under the authority of *Pirkey Brothers v. Commonwealth*, and *Russell L. Williams v. Commonwealth*, *supra*.

CONCLUSION.

For the foregoing reasons, petitioner prays that a writ of error and *supersedeas* may be awarded him; that the judgment complained of may be reviewed and reversed; that a new trial be awarded him; and that he may have such other relief as he may be entitled to under the law.

Your petitioner avers that he has, on the 16th day of June, 1942, delivered a copy of this petition to the Honorable E. P. Simpkins, Jr., Commonwealth's Attorney for Hanover County, and the attorney for the Commonwealth in the trial court, in person; that this petition will be filed in the office of the clerk of this court at Richmond; that counsel for petitioner desires to state orally the reasons for reviewing the judgment complained of; and that petitioner adopts this petition as his opening brief.

Respectfully submitted,

M. G. FRANCISCO,
By counsel.

GEO. E. HAW,
ANDREW J. ELLIS.

27° *GEORGE E. HAW,
Travelers Bldg., Richmond, Va.,
ANDREW J. ELLIS,
Law Bldg., Richmond, Va.,
Counsel for Petitioner.

We, the undersigned attorneys at law, practicing in the Supreme Court of Appeals of Virginia, and whose respective addresses are as above-stated, do certify that in our opinion

the judgment complained of in the foregoing petition is erroneous and ought to be reviewed and reversed by the Supreme Court of Appeals of Virginia.

GEO. E. HAW,
ANDREW J. ELLIS.

Received June 16, 1942.

M. B. WATTS.

Writ of error awarded. *Supersedeas* allowed. Bond \$100.00.

July 29-42.

EDW. W. HUDGINS.

Received July 29, 1942.

M. B. W.

RECORD

VIRGINIA:

In the Circuit Court for the County of Hanover.

Pleas before the Circuit Court in and for the County of Hanover.

Be it remembered that heretofore, to-wit: September 15th, 1941—

Edmund Winston, Foreman, R. P. Vass, Hugh Campbell, W. J. Chapman and J. L. Goddin, who being sworn a Special Grand Jury, being charged by the Court retired to their room and after some time returned into court and returned the following bill of indictment, to-wit:

Commonwealth

v.
M. G. Francisco

INDICTMENT FOR A MISDEMEANOR.

A True Bill,

(Signed) EDMUND WINSTON, Foreman.

EXHIBIT
C

EXHIBIT
C

Which Indictment is in the words and figures, following, to-wit:

Commonwealth of Virginia,
County of Hanover, To-wit:

In the Circuit Court of the said County:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County aforesaid, and now attending the said Court, upon their oath, present that M. G. Francisco on the 7th day of September, in the year one thousand nine hundred and forty-one, in the said County, did unlawfully labor at his trade and calling otherwise and except in household and other work of necessity and charity, said seventh day of September being a Sunday, in this, to-wit: page 2 } That the said M. G. Francisco did keep open and maintain on the said Sunday a business for the sale of beer and did on said Sunday, sell beer against the peace and dignity of the Commonwealth of Virginia.

Upon the evidence of Charlie Williams, Conway Canthorne and William J. Nichols.

Witnesses sworn in open Court and sent to the Grand Jury

And upon another day, to-wit: October 2nd, 1941.

Commonwealth

v.
M. G. Francisco

INDICTMENT FOR A MISDEMEANOR.

This day came the Attorney for the Commonwealth and the accused, M. G. Francisco having appeared in Court pursuant to summons issued against him, and plead not guilty to the indictment, and for reasons appearing to the Court the case is continued until the 17th day of October, 1941, at 10 o'clock A. M., whereupon the said M. G. Francisco was recognized for his appearance before this Court on the 17th day of October, 1941, at 10 O'clock A. M.

Thereupon Charlie Williams, Conway Canthorne and William J. Nichols, witnesses for the Commonwealth, were recognized for their appearance before this Court on the 17th day of October 1941, at 10 O'clock A. M., in the sum of Fifty Dollars respectively.

EXHIBIT

C

EXHIBIT

C

page 3 } And upon another day, to-wit: October 17th, 1941.

Commonwealth

v.
M. G. Francisco

INDICTMENT FOR A MISDEMEANOR.

This day came the Attorney for the Commonwealth, and the accused M. G. Francisco having appeared in Court pursuant to his recognizance, and being represented by Counsel, plead not guilty to the indictment, thereupon came a jury, to-wit: H. C. Valentine, Joseph Jones, Jr., Edmund C. Taylor, W. M. Alexander and B. P. Wood, who being sworn the truth upon the premises to speak, having fully heard the evidence and being instructed by the Court, retired to their room and after some time returned into court and returned the following verdict, to-wit: "We the jury find the accused guilty as charged in the within indictment and fix his punishment at a fine of \$5.00." Signed, J. M. Jones, Jr., Foreman.

And the jury being discharged, the defendant by his Counsel moved the Court to set aside the verdict of the jury as being contrary to the law and the evidence, and by misdirection by the Court; which motion the Court takes under advisement.

Thereupon the said M. G. Francisco was recognized for his appearance before this Court on the 17th day of November 1941, in the penalty of One Hundred Dollars (\$100.00) and not to depart thence without leave of this Court.

page 4 } And upon another day, to-wit: March 16th, 1942.

Commonwealth

v.
M. G. Francisco

INDICTMENT FOR A MISDEMEANOR.

The court having maturely considered the motion of the defendant to set aside the verdict of the jury in this case, as being contrary to the law and the evidence, and by misdirection by the Court; and for reasons stated in writing and hereby made a part of the record in this case, doth overrule the said motion, to which action of the court the defendant excepted; whereupon it is the judgment of the court that the accused M. G. Francisco pay a fine of \$5.00 and the costs of the prosecution.

For reasons appearing to the Court execution do not issue in this case for sixty (60) days.

page 5 } Virginia:

In the Circuit Court of Hanover County.

The Commonwealth

v.
M. G. Francisco

OPINION OF THE COURT.

The accused was indicted for the sale of beer on Sunday. He pleaded not guilty. On his trial three witnesses introduced by the Commonwealth testified that the accused sold beer at his store in Hanover County on Sunday, September 7, 1941. The accused testified that he sold beer at his place of business on that day and that he thought that he had a lawful right to sell beer on Sunday and that he made a practice of so doing. Mrs. Francisco, the wife of the accused, also testified that her husband sold beer at his place of business on the Sunday in question. So did Sheriff Sumpter Priddy who was present in the store when the sales were made to the witnesses who testified for the Commonwealth. The accused testified that he sold from fifty to sixty (50-60) cases of beer per week and that from one-fourth to one-third (1/4-1/3) of that amount was sold on Sunday. The accused testified that he kept his store open for business all seven (7) days of every week.

It appears from the evidence offered by the accused that there are sixty-one licensees of the Alcoholic Beverage Control Board with places of business in Hanover County, and that at least eighty (80%) per centum of these licensees sell beer and wine, or beer alone, on Sunday. A number of licensees testified that their customers demanded beer on Sunday and one licensee testified that out-of-state tourists not only demanded beer on Sunday but complained because they could not purchase distilled liquors from the licensee.

The evidence offered to show that the Board of Supervisors of Hanover County, although petitioned so to do by numerous citizens of the County had failed to adopt a County Ordinance prohibiting the sale of wine and beer on Sunday as authorized by Chapter 129 of the Acts of 1938. This evidence was excluded as being irrelevant, to which exception was taken.

It was stipulated that the accused had a merchant's, restaurant, a tobacco and a wine and beer license. All of these licenses are separate licenses. The merchant's license (retail) is provided for by Section 188 of the Tax Code; the restaurant license by Section 197 of the Tax Code; the tobacco license by Section 201 of the Tax Code and the wine and beer license by Section 4765 (18) of the Virginia Code of 1936. Each license authorizes the conducting of an entirely separate business which could not be lawfully conducted without such license.

The prosecution is based upon Section 4570 of the Code which reads as follows:

"If a person on a Sunday be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars for each offense. Every day any person or servant page 7 } or apprentice is so employed shall constitute a distinct offense and the court in which or the justice by whom any judgment of conviction is rendered may require of the person so convicted a recognizance in a penalty of not less than one hundred or more than five thousand dollars, with or without security, conditioned that such person shall be of good behavior, and especially to refrain from a repetition of such offense, for a period not exceeding twelve months. This section shall not apply to furnaces, kilns, plants and other businesses of like kind that may be necessary to be conducted on Sunday, nor to the sale of gasoline, or any motor vehicle fuel, or any motor oil or oils.

The exceptions provided for in the statute, which was last amended in 1932, (Acts 1932, p. 596) are as significant as are the prohibitions contained in the statute, and it is apparent from the reading of the words of the statute that no work or business of a secular nature except household or other work of necessity or charity and the specially excepted works or business not of these characters, may lawfully be performed or carried on on Sunday unless the accused falls within one of the exceptions provided for in Section 4571 of the Code, which latter exceptions are not applicable here.

The evidence showed that while the accused had a restaurant license that he had only two tables and served only sandwiches and drinks. It appeared that his primary business was that of a merchant, and he testified he always sold beer for "off premise" consumption on Sunday.

EXHIBIT

C

EXHIBIT

C

Counsel for the accused requested the Court to page 8 } give the jury a series of instructions, the effect of which would have been to leave to the jury the question as to whether the sale of beer on Sunday was or was not a work of necessity. Deeming the sale of beer on Sunday in the course of one's regular business to be plainly a violation of Section 4570 of the Code, the Court refused these instructions and instead thereof, instructed the jury as to the presumption of innocence and reasonable doubt, and then gave the following instruction:

"The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused, M. G. Francisco, did keep open and maintain on Sunday, the 7th of September in Hanover County a business for the sale of beer and did on said Sunday sell beer, they should find him guilty and fix his punishment at a fine not less than Five (\$5.00) Dollars." the effect of which was to hold that as a matter of law the sale of beer by one in the regular course of his business on Sunday constituted a violation of Section 4570 of the Code.

Did the Court err in so holding?

In *Pike Bros. v. Commonwealth*, 134 Va. 713, 726 (1922) the Court said:

"* * * There are cases where the question is one of law for the Court. Where the act is plainly a violation of the statute, as where a contractor, without emergency, is running a steam shovel on Sunday, or the act is plainly one of necessity, as where the owner lifts his ox out of the ditch; in either case the question is one of law for the Court. But if the act be one about which fair minded men might reasonably differ as to whether or not it is a work of necessity, then it is a question of fact for the jury."

Where the Supreme Court of Appeals has declared a given act to be a violation of the Sunday law and not a necessity no fair minded man and certainly no *nisi prius* Court may reasonably differ as to whether or not it is a work of necessity. Such an act is not a work of necessity but as a matter of law plainly a violation of the statute.

In *Ellis v. Carington*, 122 Va. 821, 824 (1917) the accused was the proprietor of a restaurant. He had a license to conduct such business and also a license to sell soft drinks. Ellis was convicted for violation of a town ordinance which the Court of Appeals said was "substantially in the language of the Act amending and re-enacting Section 3799 of the Code";

now Section 4570 of the Code, in that he labored at his trade or calling of selling coca-cola on the Sabbath day.

The Court of Appeals said (122 Va. 824):

"On the merits of the case, we have no difficulty in affirming the judgment. Ellis was carrying on two well defined trades or callings under separate licenses. (1) He was conducting an eating house, or restaurant, the exercise of which business on the Sabbath day, admittedly, was not a violation of the ordinance; and (2) He was engaged in selling soft drinks (including coca-cola) from a soda fountain, the sale of which on the Sabbath day is a plain violation of the ordinance. Such beverages, though not spirituous or alcoholic, cannot be dispensed without a license; and they constitute a distinct class from coffee, tea and other un- page 10 } licensed drinks, which are commonly used at meals with food. His attempt to justify the infraction of the ordinance on the plea that he did not serve coca-cola alone, but only in connection with meals, lunches and pie when called for by customers, is a palpable subterfuge and constitutes no defense. Coca-cola is not within the class of beverages covered by the eating house or restaurant license. If it were, obviously a separate license would not be necessary to authorize its sale. Ellis could not lawfully dispense soft drinks, even on a week-day without license; and plainly could not, though licensed, ply his calling of selling such drinks on the Sabbath day in any way so as to escape liability under the ordinance." (Italics supplied.)

This is a definite holding by the highest Court of the Commonwealth that the selling on Sunday of soft drinks pursuant to one's regular business is a violation of the Sunday law.

In *Hanger v. Commonwealth*, 107 Va. 872, 878-9 (1908) one Hanger who was the chief stockholder of a corporation operating a drug store and the officers of the drug company sold tobacco, soda water, etc. on Sunday. Hanger was notified by the police that unless the company ceased violating the Sunday law that it would be prosecuted. The company ceased selling such articles on Sunday. Hanger thereupon obtained a charter for a social club of which he, a stockholder in his drug company, and a clerk in the employment of such company were the incorporators.

There was no initiation fee; no dues and one became a member of the club by signing an application. The page 11 } drug company leased the club a rear room in the store occupied by the drug company. Thereafter

EXHIBIT

C

EXHIBIT

C

on Sundays Hanger and his employees sold "tobacco, cigars, cigarettes, soda water, etc." to the so-called members of the club, but not to the public generally. Any member of the club could buy in the open store of the drug company on Sunday the articles above mentioned and practically no other use was made of the certificate of membership in the club. The Commonwealth instituted a *quo warranto* proceeding to annul the charter of the social club. The trial Court annulled the charter and on writ of error to the judgment the Court of Appeals, after reviewing the evidence, said, (107 Va. pp. 878-9):

"Upon the foregoing facts, it too plainly appears to admit of discussion, that the obtaining of the charter in question and the pretended organization of a social club thereunder was for the fraudulent purpose of securing the privilege of selling tobacco, cigars, cigarettes, soda water, and other soft drinks on Sunday—a privilege which an individual could not exercise without incurring the forfeiture prescribed in Section 3779 of the Code, *supra*."

The Court further said, (107 Va. pp. 879-80):

"We are not called upon here to declare what would and what would not be an abuse of its charter by a social club, as that question has to be determined upon the facts of the particular case. In the case before us, as already observed, the proof leaves no room to doubt that the charter in question was obtained and was being used as a mere make-shift to enable the practical owner and proprietor of the Hanger Drug Co. to do, under the cloak of the charter, that which an individual could not do and escape punishment."

The decision in *Hanger v. Commonwealth*, *supra*, is a definite holding that it is a violation of the Sunday law for one licensed to sell tobacco, cigars, cigarettes, and soda water to sell the same on Sunday. It is manifest that where the Court of final resort has construed a statute and declared that a given act or series of acts constitutes a violation thereof that a similar act necessarily is a violation of the statute, and the doing of the act being proved or admitted, presents a question of law for the Court and not a question of fact for the jury.

In *Hanger v. Commonwealth*, *supra*, it was clearly held that the sale of tobacco, cigarettes, cigars, soda water and other

soft drinks by a merchant on Sunday was a violation of the Sunday law. *Ellis v. Covington*, *supra*, clearly holds that it is unlawful for one engaged in the selling of soft drinks to sell the same on Sunday. The opinions in these cases were written by judges of recognized ability and concurred in by a Court composed of some of the ablest judges that have sat upon the Court of Appeals. The opinion in *Hanger v. Commonwealth*, *supra*, was written by Cardwell, J. and concurred in by Keith, P. and Buchanan, Harrison and Whittle, J. J. The opinion in *Ellis v. Covington*, *supra*, was written by Whittle, P. and concurred in by Kelly, Sims, Prentiss and Burks, J. J.

The decisions in these cases have never been questioned in this State and are in accord with the great weight of authority. *State v. James*, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 A. S. R. 902, 16 Ann. Cas. 277 page 13 } (1908) cited with approval in *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 723 (1922); *McAfee v. Commonwealth*, 173 Ky. 83, 190 S. W. 671, L. R. A. 1917-C 377 (1917); *McKeown v. State*, 197 Ark. 454, 124 S. W. 2nd, 19 (1939), and *State v. Corologos*, 59 A. L. R. (Vt.) 1541, 1546-47 (1928).

The law would soon cease to be law and become anarchy if trial Courts or juries were at liberty to disregard and set at naught the decisions of the Supreme Court of Appeals that are clearly in point.

Aside from this on principle, how can it be said that the sale of beer on Sunday is a work of necessity or capable of being made such? The vendor of beer cannot show that its sale on Sunday is necessary to save himself from serious or unexpected loss or that its sale on Sunday is necessary to save the public from unusual discomfort or inconvenience.

"No one," said the Supreme Court of Vermont in *State v. Corologos*, 59 A. L. R. 1541, 1546-7 (1928), "has ever had the temerity to claim that the butcher or grocer can keep open market on Sunday simply because the articles in which they deal constitute necessities. Admitting that a reasonable necessity for any commodity may excuse a sale thereof on Sunday, nothing short of such necessity will excuse it. To hold otherwise would be to repeal, in effect, the express limitation imposed by the legislature."

Beer is a species of alcoholic beverages and alcoholic beverages, including beer, have never been regarded as a necessity. At the most alcoholic beverages are a permissible luxury, even though they may be in common use.

EXHIBIT C

EXHIBIT C

As has been pointed out above, the accused admitted that he engaged in the indiscriminate sale of beer to the general public on Sunday. Neither common sense nor sound morality would or could regard such acts as necessary. *McAfee v. Commonwealth*, 17 Ky. 83, 190 S. W. 671, L. R. A. 1917-C 377 (1917); *McKewen v. State*, 197 Ark. 454, 124 S. W. 2nd. 19 (1939).

The decisions in *Pirkey Bros. v. Commonwealth*, 134 Va. 713 (1922); *Lakeside Inn v. Commonwealth*, 134 Va. 606 (1922); and *Crook v. Commonwealth*, 147 Va. 593 (1927) are all cases which involved acts about which fair-minded men might reasonably differ as to whether or not the act in question was a work of necessity. The Court of Appeals had never declared that the acts complained of in those cases were plain violations of the Sunday Law. They were acts about which reasonable men could differ in the absence of such a decision.

The case at bar is entirely different. Here the accused, a merchant, sold to the general public beer on Sunday. Such an act has been twice declared by the Court of Appeals to be a violation of the Sunday Law. *Hunger v. Commonwealth*, 107 Va. 872, 878-9 (1908); and *Ellis v. Corington*, 122 Va. 821, 824 (1917).

It must, therefore, be concluded that the question presented by the evidence here is one of law for the Court and not a question of fact for the jury, and it is so held.

The accused requested instruction No. 11 which was refused. This instruction reads as follows:

"The Court instructs the jury that by an act page 15 } of the General Assembly of Virginia passed at the 1934 Session there was created an Alcoholic Beverage Control Board with power to issue to retailers in the State of Virginia licenses for the sale of beer and wine and pursuant thereto said Board has proceeded to issue to the retailers in Virginia, including the defendant, such licenses without any restriction therein as to sales on Sunday; further that by a further act of the General Assembly passed in 1938 the Board of Supervisors of the several Counties in Virginia were empowered to pass ordinances to prohibit the sale of wine and beer on Sunday, which act provided that nothing therein should be construed as altering, amending or repealing Section 4570 of the Code (commonly known as the Sunday blue law). Further the Court tells the jury that it appears from the evidence that since the passage of the Act of 1938 application has been made to the Board of Supervisors of Hanover County to pass an ordinance prohibiting

EXHIBIT

J

EXHIBIT

C

M. G. Francisco v. Commonwealth

29

the sale of beer and wine in Hanover County on Sunday, but regardless of its power to do so the Board of Supervisors refused to pass such ordinance and that there is in existence in Hanover County no ordinance of said Board which prohibits the sale of beer and wine on Sundays."

The purpose of this instruction was to tell the jury that the Alcoholic Beverage Control Board has licensed the sale of beer and wine on Sunday and that the Board of Supervisors had acquiesced in this by failing to exercise the powers conferred on it by Chapter 129 of the Acts of 1938.

It is said that the Alcoholic Beverage Control Board has knowingly permitted its licensees (except in counties and cities whose governing body have availed themselves of the provisions of Chapter 129 of the Acts of 1938) to sell wine and beer on Sunday.

It is true that the Alcoholic Beverage Control Board has raised no objection to its licensees selling wine and beer on Sunday except in those political sub-divisions whose governing bodies have enacted ordinances pursuant to the provisions of Chapter 129 of the Acts of 1938 (Acts 1938, p. 194).

I am advised, however, by Hon. G. Stanley Clarke, the Assistant Attorney General assigned to the Alcoholic Beverage Control Board, that the Board has never authorized or attempted to authorize any licensee to sell wine and beer on Sunday. The reason for this is perfectly obvious. No administrative agency of the executive branch of the government possessed the authority to repeal or set at naught any positive enactment of the General Assembly.

While the power to delegate to administrative agencies the authority to adopt rules and regulations having the force and effect of law, to a limited extent, seems to be recognized in this State, it has never been held under our system of government that the power can be delegated to an administrative agency of the executive branch of government to repeal or suspend the operation of positive law. *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275 (1853).

Section 40 of the Constitution declares that:

"The legislative power of the State shall be vested in a General Assembly which shall consist of a Senate and House of Delegates."

page 17 } Section 39 of the Constitution divides the powers of government into three branches, legislative, executive and judicial, and declares that, except as otherwise provided in the Constitution, that these three departments

of government "shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

The power to make laws for the people of the Commonwealth is vested in the General Assembly which in its assembly represents all of the people of the Commonwealth. The laws enacted by the Assembly derive their force from the fact that they are the will of the whole people expressed by their authorized representatives in the forms provided by the Constitution and on subjects or questions on which the representatives have been entrusted to act. As was said in *State v. Field, supra*, (59 Am. Dec. pp. 277-8):

"* * * This power, thus reaching every citizen in every relation and interest, is to be regarded as a sacred trust, which is to be exercised by those to whom it has been committed, and every citizen has a right to demand that the rule for his conduct shall be established by that body in which he, with his other fellow-citizens, have vested the power. * * *"

It must, therefore, be concluded that not even the General Assembly can delegate to any other body the power to repeal a law which it has lawfully enacted. Black's Constitutional Law (2nd. Ed.) pp. 321-322; *Seneca County Bank v. Lamb*, 26 Barb. (N. Y.) 595 (18).

Moreover, when the legislative grant of power page 18 } to the Alcoholic Beverage Control Board is examined it will be seen that the General Assembly has not attempted to confer on it any such power. The Statute which authorizes the Board to make regulations is Section 4675 (5) of the Virginia Code of 1936. So far as it is applicable it provides:

"The Board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the Board shall deem necessary to carry out the purposes and provisions of this act and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages or any one or more of such illegal acts, and from time to time alter, repeal, or amend such regulations, or any of them. * * * (Italics supplied.)"

It will be seen that the authority under which the Board promulgates regulations having the force and effect of law prohibits it from promulgating any such regulation which is

inconsistent with the general laws of the State which include Section 4570 of the Code. If the Board had attempted by regulations or license to authorize the sale of wine and beer, either or both, on Sunday, such regulation or license would be in conflict with the statutory grant of power under which it is authorized to act as well as in conflict with Section Seven of the Constitution which declares:

"That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people is injurious to their rights and ought not to be exercised."

If Chapter 129 of the Acts of 1938 (Acts 1938, page 19 } p. 194) had contained nothing more than the first two paragraphs found in that act there would be force in the contention that this Act was intended to confide in the Boards of Supervisors of the Counties and the councils of cities and towns the authority to regulate the sale of wine and beer on Sunday even to the extent of permitting by ordinance the sale thereof on Sunday, and that the Alcoholic Beverage Control Board had no duties in the matter unless such an ordinance was adopted.

The General Assembly, however, did not stop with the first two paragraphs of the Act. In the last paragraph thereof they placed a proviso which reads as follows:

"It is further provided, however, that no provision herein contained nor any ordinance that may be passed in pursuance thereof, shall be construed as in any way altering, amending or repealing section 4570 of the Code of Virginia."

It would have been impossible to have drawn a proviso in more sweeping and all inclusive terms to accomplish the purposes used in the proviso found in Chapter 129 of the Acts of 1938. It expressly provides that nothing contained in the Act itself nor in any ordinance adopted thereunder "shall be construed as in any way altering, amending or repealing Section 4570 of the Code of Virginia."

If Section 4570 of the Code of Virginia did not prohibit one from engaging in the sale of wine and beer on Sunday pursuant to his trade or calling there would have been no necessity for the proviso.

During the course of the prohibition regime in page 20 } Virginia (1916-1933) the General Assembly acquired the extremely bad habit of enacting statutes allowing the political sub-divisions to parallel the crimi-

EXHIBIT

C

EXHIBIT

C

nal statutes relating to the prohibition of the manufacture, sale and possession of ardent spirits. See Sec. 27 of Chapter 383 of the Acts of 1918 (Acts 1918 p. 593); Section 37 of Chapter 407 of the Acts of 1924 (Acts 1924 pp. 606-7); Chapter 112 Acts of 1928 (Acts 1928—520-21); Chapter 394 Acts 1930 (Acts 1930 pp. 830-1); Virginia Code of 1924 Sections 4675 (34) and 4675 (35); Sections 4675 (34); 4675 (35); and 4675 (37) of the Virginia Code of 1930.

Ordinances adopted pursuant to such legislation were enforced in many jurisdictions instead of the State prohibition law. *Collins v. Radford*, 134 Va. 518 (1922); *Campbell v. Danville*, 138 Va. 817 (1924); *Zimmerman v. Bedford*, 134 Va. 787 (1922); *Jordan v. South Boston*, 138 Va. 838 (1924) and *Brooke v. Town of Potomac*, 149 Va. 427 (1928). In *Bryan v. Commonwealth*, 126 Va. 749 (1919) it was held that a prosecution under such an ordinance was a bar to further prosecution under the statute for the same act by virtue of Section 8 of the Constitution which declares that no man shall "be put twice in jeopardy for the same offense," the prohibition Act having prohibited the localities from enacting ordinances that provided a lesser penalty than that fixed for similar offenses under the statute.

By this method Section 134 of the Constitution segregating "all fines collected for offenses committed against the State" to the Literary Fund was for all practical purposes nullified and many thousands of dollars diverted from the Literary Fund into the treasuries of the political subdivisions of the Commonwealth.

It is a matter of common knowledge that Chapter 129 of the Acts of 1938 was enacted largely as the result of the efforts of pressure groups. The General Assembly was careful, however, to make it clear that nothing contained in the Act or in any Ordinance passed in pursuance thereof should be considered "as in any way altering, amending or repealing Section 4570 of the Code."

Of necessity, the General Assembly must have concluded that section 4570 of the Code prohibited the sale of wine and beer on Sunday and that it was, by Chapter 129 of the Acts of 1938 merely giving to the localities the authority, by ordinance, to parallel the existing State law pursuant to the evil system which has become a part of our legislative custom.

The general and usual function of a proviso is to exclude what follows from the general statement or provisions which precedes it. As was said by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 30 (1825):

EXHIBIT
C

EXHIBIT
C

"The proviso is generally intended to restrain the enacting Clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting Clause."

The Court of Appeals in *Commonwealth v. Ford et al*, 29 Gratt. 683, (1878) after quoting the foregoing definition of a proviso said:

"Substantially the same definition is given by Mr. Justice Baldwin in 15 Peters R. 423: 'The Office of the proviso,' says he, 'generally is either to except something from the enacting clause, to restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended to be brought within its purview.'"

To the same effect are *Jordan v. South Boston*, 138 Va. 838 8456 (1924); *Loyd Corporation v. Commonwealth*, 126 Va. 39, (1919); *Norfolk & P. Traction Co. v. White*, 113 Va. 102, 106 (1912) and *Werth v. Fire Adjustment Bureau*, 160 Va. 845, 857 (1933).

In *Loyd Corporation v. Commonwealth*, *supra*, the Court held that if there is a conflict between the body of a statute and a proviso, then the proviso must prevail as the later expression of the legislative intent.

In *Norfolk & P. Traction Co. v. White*, *supra*, the Court said (113 Va. 106):

"The general rule undoubtedly is that the appropriate office of a proviso is to restrain or modify the enacting clause or preceding matter, and that a proviso to a particular section does not apply to other sections. But if, from the context, and a comparison of all the provisions relating to the same subject matter, it is clear that it was intended to give the proviso an effect beyond the phrase immediately preceding it, or a scope beyond the section of which it is a part, it will be construed as restraining or qualifying preceding sections relative to the same subject matter of the proviso, as tantamount to the enactment of a separate section without regard to its position and connection. . . ."

The office of the proviso as used in Chapter 129 of the Acts of 1938, was to make it clear that nothing contained in it

Act "should in any way be construed as altering,
page 23 } amending or repealing section 4570 of the Code of
Virginia."

Moreover, the declared purpose of the proviso of Chapter 129 of the Acts of 1938 is strictly in accord with the declared policy of the Commonwealth as set forth in Section 5, Sub-section fifteenth of the Code which provides:

"Where the Council or authorities of any city or town, or any corporation, board, or number of persons are authorized to make ordinances, by-laws, rules, regulations, or orders, it shall be understood that the same *must not be inconsistent with the Constitution and laws of the United States or of this State.*" (Italics supplied.)

To hold otherwise would be for the Court by judicial decision to change or alter the law as enacted by the General Assembly. This would not be permissible even if the Court were inclined to do so. If the law is to be changed it must be done by legislative enactment. "It is the function of the Courts to interpret the law, and that of the Legislature, within Constitutional limits, to make or alter the law." *Wells v. Insurance Co.*, 213 N. C. 178, 116 A. L. R. 130, 134 (1938); *Durham v. Woodson*, 155 Va. 93, 101 (1930); *Olshan v. Chrystal*, 54 A. L. R. (N. J.) 1227, 1229-30 (1927); and 25 R. C. L. 963, Title Statutes *see* 218.

It is, therefore, concluded that Chapter 120 of the Acts of 1938 has no bearing on this controversy since it expressly provides that no provision therein contained shall be "construed as in any way altering, amending or repealing Section 4570 of the Code of Virginia." Hence any reference to the failure of the Board of Supervisors to adopt a County ordinance under authority of Chapter 129 of the Acts of 1938 was clearly irrelevant and properly excluded, and not a proper subject for an instruction to the jury.

The motion to set aside the verdict of the jury is, therefore, overruled, and judgment will be entered on the verdict.

LEON M. BAZILE, Judge.

January 19, 1942.

EXHIBIT
C

EXHIBIT
C

page 25 } STENOGRAPHER'S TRANSCRIPT.

Virginia:

In the Circuit Court of Hanover County.

Commonwealth of Virginia

v.
M. G. Francisco.

October 17, 1941.

Identified this 5th day of May, 1942.

LEON M. BAZILE, Judge.

May 5, 1942.

page 26 } Virginia:

In the Circuit Court of Hanover County.

Commonwealth of Virginia

v.
M. G. Francisco.

Transcript of testimony and other incidents in the trial of the above-styled case before Hon. Leon M. Bazile, Judge of said Court, and a jury, on the 17th day of October, 1941.

Appearances: Edward P. Simpkins, Jr., Esq., Commonwealth's Attorney.

George E. Haw, Esq., Andrew J. Ellis, Esq., Counsel for the defendant.

page 26½ } Index.

page 27 } WILLIAM J. NICHOLS,
a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Simpkins:

Q. You are Mr. William J. Nichols?

A. Yes, sir.

William J. Nichols.

Q. Where do you live, Mr. Nichols?

A. I live at Tyler, the upper end of Hanover County.

Q. How far do you live from Mr. M. G. Francisco?

A. Three miles, according to my speedometer on the car.

Q. Does Mr. M. G. Francisco live in Hanover County?

A. Yes, sir.

Q. You are a special officer of Hanover County, as I understand it?

A. Yes, sir.

Q. What business does Mr. Francisco operate in Hanover County?

A. Well, it is general merchandise, wines and beer, soft drinks.

Q. General merchandise, wine, and what?

A. Beer.

Q. Beer?

A. And soft drinks of all kinds.

Q. Soft drinks, gasoline, and oil?

page 28 } A. Gasoline and oil.

Q. Under general merchandise does he sell groceries?

A. Yes, sir.

Q. Does he handle some notions, such as wash tubs and things of that kind?

A. Yes, sir.

By the Court:

Q. Does he operate a restaurant?

A. Not to my knowing. I never seen him serving meals.

Mr. Ellis: I submit, if Your Honor please, that all of that evidence as to the store is immaterial.

The Court: This is immaterial—

Mr. Ellis: In this case. There is another case in which that is material.

The Court: Yes.

Mr. Ellis: But in this particular case the indictment charges that he maintained a—

The Court: I will sustain the objection.

Mr. Simpkins: It shows the background and circumstances under which the beer was sold.

The Court: He is entitled to show what licenses he has and the business that he conducts as a general groundwork for what he has laid the foundation for. You can show that

EXHIBIT

C

EXHIBIT

C

William J. Nichols.

he has a license to sell wine and beer—
page 29 } Mr. Simpkins: Yes, I will show that.

Mr. Ellis: We will admit it. And also his license as a general merchant.

The Court: Couldn't you stipulate what licenses he has?

Mr. Simpkins: We are perfectly willing to stipulate it.

The Court: I think that would be the simplest way to do it, and then confine the evidence to the facts.

Mr. Ellis: All right. It is stipulated and agreed by and between the Attorney for the Commonwealth and counsel for the defendant that the defendant, M. G. Francisco, is now, and was on Sunday, September 7th, 1911, and for some time prior thereto, a duly licensed merchant in the County of Hanover operating a store located within the said County; that he also possessed a license to sell soft drinks, a license to sell cigarettes, cigars and tobacco, and a license to sell beer both on premises and off premises, a license to sell wine for consumption off premises, and a license to operate a restaurant.

By Mr. Simpkins:

Q. Now, Mr. Nichols, did you visit Mr. Francisco's place on Sunday, September 7th?

A. Yes, sir.

Q. Does he operate a restaurant?

A. Not to my knowing. I have never seen any meals served in the building.

Q. Any tables in there to serve meals?

A. Not in the store room.

Q. That is where he does his beer business, isn't it?

A. Yes, sir.

Q. Who was waiting on the trade that afternoon, that Sunday that you were there?

A. Mr. Francisco, from what I saw.

Q. Mr. Francisco? How many people were there?

A. I don't remember.

Q. Approximately?

A. I don't remember. I saw a car sitting out there in front.

By the Court:

Q. Were there many or few?

A. There was about two or three, as well as I can remember. I don't know, to be positive about it, but there was about two or three cars sitting in front of the store.

William J. Nichols.

Q. Did you observe Mr. Francisco make any sales of beer while you were there? Did you see him make any sales?

A. Yes, sir, I saw him sell some to Mr. Williams and Cauthorne.

Q. You saw him sell some to Mr. Williams and Mr. Cauthorne? How much did he sell Mr. Williams?

page 31 } A. Just one bottle.

Q. One bottle. How much did he sell to Mr. Cauthorne?

A. One bottle.

Q. Was that beer consumed on the premises or was it taken away?

A. It was taken away.

Q. Did you see him sell any for consumption on the premises?

A. No, sir, not that day.

Q. Not that day? How long did you stay there?

A. About five minutes, I suppose.

Q. About five minutes?

CROSS EXAMINATION.

By Mr. Haw:

Q. Did Mr. Williams and Mr. Cauthorne go to Mr. Francisco's place with you?

A. Yes, sir.

Q. For what purpose did you three go there?

A. To buy some beer.

Q. For what purpose were you going to buy beer?

A. To bring to Court this evidence against Sunday selling.

Q. Did you three go together for the purpose of going there in order to lay a foundation for this prosecution?

A. No, sir, we did not. I just went by this man's place and picked them up in my car and carried them up there.

Q. Well, then, you started off with yourself

page 32 } picked up Mr. Williams and Mr. Cauthorne, and went to Mr. Francisco's place for the purpose of securing evidence on which to prosecute him for violation of the Sunday law; is that right?

A. Yes, sir.

Q. Now, at whose direction did you do this?

A. Well, I was directed by the Honorable Judge and the Commonwealth's Attorney to bring evidence in Court. There had been several complaints from different people.

William J. Nichols.

Q. I didn't ask about complaints. I asked at whose direction. Just answer my question.

A. I answered correctly.

Q. So the purpose of going there was to attempt to entrap Mr. Francisco into what you considered a violation of the law; is that right?

A. No, sir, I wasn't attempting to entrap him at all.

Q. That is what you did, wasn't it?

A. No, sir, I don't consider that trapping. He just sells beer to anybody on Sunday over 21. I don't believe he sells to anyone under 21, not to my knowing.

Q. How many filling stations and stores in that section of Hanover County do likewise on Sunday, sell beer on Sunday?

A. Not in my neighborhood. That is the only place that stays open all day on Sunday.

page 33 } Q. How many more places do you know of that stay open all day Sunday?

A. I couldn't tell you. There is some in the County, but my business is—

Q. How about Montpelier?

A. I don't go over that way but very little.

Q. Well, you know that there are places generally all over the County that do keep open on Sunday and do sell beer; that is a fact, isn't it?

A. So I have heard say.

Q. You have seen them, haven't you?

A. No, sir. I don't go by those places on Sunday.

Q. Do you ever travel up and down the Washington highway?

A. No, sir, not on Sunday.

Q. What do you do, stay at home all day Sunday?

A. I go to church and Sunday school. Most of the time I—

Q. But you do know that generally throughout the County beer is sold on Sunday?

A. I know that is the report.

RE-DIRECT EXAMINATION.

By Mr. Simpkins:

Q. You had discussed, Mr. Nichols, I believe, with the Judge and with me here what you could do to bring a prosecution, had you not?

A. Yes, sir.

William J. Nichols.

page 34 } Q. And you were told that was what you had
to do if you desired to bring a prosecution, to get
evidence?

A. Yes, sir.

Q. You operate a store yourself, don't you?

A. We operate a grocery store.

Q. About how far from Mr. Francisco?

A. About three miles, around three miles to the east.

Q. You are a competitor, are you?

A. Sir?

Q. You are a competitor?

A. No, sir.

Q. Not a competitor, within three miles of him?

A. My wife operates the store in her own name. I haven't
anything to do with it.

Q. Well, your wife is a competitor of Mr. Francisco's?

A. No, sir, we don't consider it that way. That has been
our home down there for about 26 years, a long time before
he came into Hanover County.

Q. You work in Richmond, do you not, sir?

A. Yes, sir.

Q. Mr. Nichols, do you have the beer that was purchased
that day?

A. Yes, sir.

Q. Will you get that and bring it in?

A. I will.

page 35 } RE-CROSS EXAMINATION.

By Mr. Haw:

Q. Did you go in Mr. Francisco's house that day or stay
on the outside?

A. Stayed on the outside and looked through the window.

Q. Stayed on the outside and looked through the window?

A. And watched the sale made.

Q. Why didn't you go in?

A. I figured he wouldn't want to sell, knowing that I was
an officer.

Q. He was licensed to sell, wasn't he?

A. Sure.

Q. And he always had sold, hadn't he?

A. I don't know about that. I don't drink beer and I don't
buy it from anybody.

Q. When was the last time you were in Francisco's place?

A. It has been about a week ago.

EXHIBIT

C

EXHIBIT

C

William J. Nichols.

Q. Before this occasion?

A. I don't know. I was in and out there real often, I have
been, until I went to Richmond to work.

RE-DIRECT EXAMINATION.

By Mr. Simpkins:

Q. Had you observed sales of beer on any Sunday prior
to that?

A. Yes, sir.

Q. You had?

page 36 } A. Yes, sir. He stays open all the time.

Q. He stays open all the time? This wasn't
anything unusual, as far as you knew?

RE-CROSS EXAMINATION.

By Mr. Haw:

Q. Was it sold in your presence the other times?

A. Yes, sir. He was selling it all the time.

Q. When were you appointed an officer?

A. I don't remember. It hasn't been so very long. I
haven't the date here. I don't remember the date.

RE-DIRECT EXAMINATION.

By Mr. Simpkins:

Q. Will you go and get that beer now that you have?

A. Yes, sir.

Note: Witness produces two bottles of beer.

Q. Is this the beer that was purchased by Charlie Williams
and Conway Cauthorne?

A. Yes, sir.

Q. Was it turned over to you?

A. Yes, sir.

Q. You have had it since that time?

A. Yes, sir. One bottle of Horton beer and one bottle of
Old Dutch beer.

Witness stood aside.

page 37 } CHARLIE WILLIAMS,
a witness introduced on behalf of the Common-
wealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Simpkins:

Q. You are Charlie Williams?

A. Yes, sir.

Q. Did you go to Mr. Francisco's place in the Beaver Dam district on Sunday, the 7th of September?

A. Yes, sir.

Q. Was the place of business open?

A. Yes, sir.

Q. Who was there?

A. All I saw was Mr. Francisco and his boy and myself and Cauthorne. I stayed there about five minutes and I come on out.

Q. Did you purchase anything while you were there?

A. Sir?

Q. Did you buy anything while you were there?

A. Yes, sir.

Q. What did you buy when you were there?

A. I bought one bottle of beer. That is all I bought.

Q. You bought one bottle of beer?

A. Yes, sir.

page 38 } Q. Didn't buy anything else?

A. No, sir.

Q. What did you do with that bottle of beer?

A. I started home with it, me and Mr. Nichols, and got in the car with him.

Q. And what did you do with that bottle of beer?

A. I gave him the beer.

By the Court:

Q. Whom did you buy the beer from?

A. Sir?

Q. Whom did you buy the beer from?

A. I bought it from Mr. Francisco.

By Mr. Simpkins:

Q. Mr. M. G. Francisco?

A. Yes, sir.

Q. How much did you pay for it?

EXHIBIT

J

Charlie Williams.

By the Court:

Q. That gentleman there?

A. Yes, sir.

By Mr. Simpkins:-

Q. How much did you pay for it?

A. Sir?

Q. How much did you pay for it?

A. Ten cents.

Q. Ten cents. Had you been accustomed to go-
page 39 } ing there on other days before that?

A. Sure.

Q. How long had you lived in the community?

A. I don't know. I have been living there for a good while.

Q. Ten years?

A. More than that, I reckon.

Q. And how far do you live from this store?

A. From his store?

Q. Yes.

A. I suppose about a mile and a half.

CROSS EXAMINATION.

By Mr. Ellis:

Q. Your name is Mr. Williams?

A. Yes, sir.

Q. Where do you live, Mr. Williams?

A. I live on Mr. Johnson's place.

Q. What Johnson?

A. Joseph Johnson.

Q. Joseph Johnson?

A. Yes, sir. He is in the courtroom.

Q. You live on his place?

A. Yes, sir.

Q. Where does Mr. Cauthorne live?

A. Mr. Cauthorne, he lives on Mr. Johnson's place.

Q. The same Mr. Joe Johnson who is sitting in this court-
room?

page 40 } A. Yes, sir.

Q. He is the other witness in this case, isn't he?

A. I suppose so.

Q. Who took you up there to Mr. Francisco's?

A. Mr. Nichols.

Q. Mr. Nichols?

A. Yes, sir.

EXHIBIT

C

Charlie Williams.

Q. I thought you told us you met Mr. Nichols after he came—after you came out of the store.

A. No, Mr. Nichols carried me from Mr. Johnson's.

Q. From whose house?

A. Mr. Nichols carried me from Mr. Johnson's house.

Q. Where Mr. Joe Johnson lived?

A. Yes, sir.

Q. You don't live in the same house with Mr. Johnson, do you?

A. Went from Mr. Johnson's house to Mr. Francisco's.

Q. I say, you don't live in the same house, in Johnson's house that he lives in, do you?

A. No, sir.

Q. What?

A. No, sir, I don't live in the same house.

Q. Was Mr. Cauthorne in Mr. Joe Johnson's house too that Sunday?

A. Yes, sir.

Q. And you carried Mr. Cauthorne from Mr. Joe Johnson's house?

A. No, Mr. Cauthorne was at Mr. Johnson's.

Q. When you got there?

A. And I was there, and Mr. Nichols was there too.

Q. How did you get there?

A. We got in the car—

Q. Wait a minute. How did you get from your house to Mr. Joe Johnson's house?

A. I walked.

Q. How far is it?

A. From my house to Mr. Johnson's.

Q. Yes.

A. Well, as near as I can put it, I reckon about two miles.

Q. How far is it from Mr. Cauthorne's house to Mr. Joe Johnson's?

A. I don't know. He will have to answer that himself.

Q. I will ask him that; you don't know that?

A. No, sir.

Q. Well, how did you happen to go to Mr. Joe Johnson's house Sunday afternoon, this particular Sunday afternoon?

A. Well, I had been usually going there on Sunday.

Q. Every Sunday?

A. Yes, sir.

Q. Up to his house?

A. Yes, sir, and sometimes in the week.

page 42 } Q. In the week?

EXHIBIT

EXHIBIT

C

M. G. Francisco v. Commonwealth

Charlie Williams.

A. Yes, sir.

Q. Did anybody send for you this Sunday?

A. Sir?

Q. Did anybody send for you this Sunday?

A. No, sir.

Q. Well, can you explain how you and Mr. Nichols and Mr. Cauthorne all happened to meet in Mr. Joe Johnson's house this Sunday afternoon?

A. Well, I couldn't tell you that. I can't answer that question.

Q. You can't?

A. No, sir.

Q. Who gave you the money to buy the beer?

A. Mr. Nichols.

Q. Mr. Nichols?

A. Yes, sir.

Q. Do you know where he got it?

A. No, sir.

Q. So, when you bought the beer, was it your beer or Mr. Nichols' beer?

A. I suppose it must have been his beer. He gave me the money.

Q. So then you didn't just give him the bottle of beer after you bought it?

page 43 } A. No, sir.

Q. You had bought beer down there in Mr. Francisco's store before, hadn't you?

A. Yes, sir, many a time.

Q. Many a time?

A. Yes, sir.

Q. You didn't give it to Mr. Nichols when you bought it before, did you?

A. No, sir.

Q. Drank it, didn't you?

A. Yes, sir.

By the Court:

Q. Did you ever buy beer there on Sunday before?

A. Sir?

Q. Did you ever buy beer there on Sunday before?

A. Yes, sir, many a time.

Q. On Sunday?

A. Yes, sir.

Conway Cauthorne.

RE-DIRECT EXAMINATION.

By Mr. Simpkins:

Q. When you bought it before, whom did you buy it for?

A. Who did I buy it for? I bought it for myself.

Q. You didn't give it away, did you?

A. No, sir.

Q. Did you ever buy it for anybody else?

page 44 } A. Did I ever buy it for anybody else?

Q. Did you ever buy it for anybody else besides

this bottle you bought for Mr. Nichols?

A. No, sir. When I buy it, I always buy it for myself.

Q. On Sunday you buy it in a bottle and take the bottle away, don't you?

A. Yes, sir.

Q. Did you ever buy it there on week days?

A. Yes, sir, sometimes.

Q. You can drink it there on the premises on week days.

A. Yes, sir.

Q. But he won't let you drink it there on the premises on Sunday?

A. No, sir.

Witness stood aside.

page 45 } CONWAY CAUTHORNE,
a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Simpkins:

Q. You are Mr. Conway Cauthorne?

A. Yes, sir.

Q. Do you know where Mr. M. G. Francisco's place is near Beaver Dam?

A. Yes, sir.

Q. How far do you live from there?

A. I reckon it is about three miles and a half; something

like that.

Q. Are you accustomed to going there?

A. Not much.

Q. Did you go there on Sunday, September 7th?

A. Yes, sir.

Conway Cauthorne.

Q. And did you see Mr. Francisco?

A. Yes, sir.

Q. Was the place of business open?

A. Yes, sir.

Q. Being operated by him?

A. Yes, sir.

Q. Did you make any purchase there?

page 46 } A. I just went up there to buy some beer.

Q. Did you have any conversation with him when you bought the beer?

A. No, sir. I told him I wanted some beer and a bottle of Coca-Cola. He says: "All right, you want one bottle?"

Q. Say that over. I didn't understand you.

A. I went in there and I told him I wanted a bottle of Coca-Cola and a bottle of beer. He said: "Do you want some more beer?"

Q. After you bought the first bottle he asked you did you want some more?

A. Asked me did I want some more.

Q. What did you tell him?

A. I told him, no, sir, that was enough.

Q. What did you do with the bottle of beer you bought?

A. I gave it to Mr. Nichols.

Q. Who else was in the store at the time, do you know?

A. Mr. Williams was in there.

Q. Mr. Williams was in there? Who else?

A. Mr. Francisco and myself.

Q. Anybody else?

A. That is all I seen.

Q. What time of day was it?

A. It was around about four.

Q. In the afternoon?

page 47 } A. Yes, sir.

CROSS EXAMINATION.

By Mr. Ellis:

Q. Mr. Cauthorne, after you bought the bottle of beer, didn't Mr. Francisco say would you have something else?

A. No, sir, he says: "You want some more beer?"

Q. Didn't you say, yes, you would take a plug of tobacco?

A. No, sir.

Q. Did you buy any tobacco?

A. No, sir.

Q. What?

Conway Cauthorne.

A. No, sir, I did not.
 Q. You didn't buy any chewing tobacco there that day?
 A. No, sir.
 Q. Did anybody buy any chewing tobacco while you were in there that day?
 A. Mr. Butler bought a piece of chewing tobacco.
 Q. Saunders Butler, while you were in there?
 A. Yes, sir.
 Q. How old are you, Mr. Cauthorne?
 A. Forty years old.
 Q. And where do you live?
 A. I live at Mr. Johnson's.
 Q. On whose property, Mr. Joseph J. Johnson's?
 A. Yes, sir.
 page 48 } Q. That gentleman who is sitting in the court-room?
 A. Yes, sir.
 Q. How far from Mr. Joseph J. Johnson's house?
 A. I don't know, I reckon about half a mile. I haven't measured it.
 Q. How far from Mr. Charles Williams' house?
 A. Charlie Williams' house I should say about a mile.
 Q. And your house and Mr. Williams' house both are in the same direction from Mr. Johnson's house?
 A. Yes, sir.
 Q. How often do you go by Mr. Johnson's on Sunday afternoon?
 A. I have been going up there about every Sunday for don't know how long.
 Q. What do you do for a living?
 A. I farm.
 Q. Farm on Mr. Johnson's farm?
 A. Yes, sir.
 Q. Where did you get the money to buy this beer?
 A. I got it in my pocket.
 Q. You have got it now?
 A. The money?
 Q. Yes.
 A. I have got enough to get another beer.
 Q. I said, where did you get the money with which you bought the beer?
 A. I worked for it.
 page 49 } Q. Was it your money?
 A. Yes, sir, it was my money.
 Q. Mr. Nichols didn't give you the money?

EXHIBIT

C

EXHIBIT

C

Conway Cauthorne.

A. No, sir.
 Q. But you took what you got for the money and gave it to Mr. Nichols?
 A. Yes, I told him if he wanted a bottle of beer I would give him a bottle of beer.
 Q. You did? Had you ever bought any beer there at Mr. Francisco's before?
 A. I have bought some of it before, but that was the first time I ever bought any on Sunday.
 Q. When you bought it before, did you give it away?
 A. I think I drank it.
 Q. You think you drank it? When you purchased something like that you drank it?
 A. I don't drink beer much.
 Q. Please tell the jury whether or not somebody else supplied you or furnished you with the money with which to make this purchase.
 A. No, sir. Nobody didn't give me no money to buy no beer.
 Q. Who took you down there to the store?
 A. Mr. Nichols carried me up there.
 Q. Did you see anybody when they gave Mr. page 50 } Williams the money to buy the beer?
 A. I didn't see him, no, sir.
 Q. When you left Mr. Johnson's, before you left Mr. Johnson's house, did you all talk about going down there for the purpose of getting beer?
 A. No, sir.
 Q. Didn't say anything in the world about it?
 A. No, sir.
 Q. When you left the yard, did you all three leave together, you and Mr. Nichols and Mr. Charlie Williams?
 A. No, sir.
 Q. You all left separately?
 A. Me and Mr. Nichols went on down the road, and Mr. Williams was at home.
 Q. Mr. Williams was at home?
 A. Yes, sir.
 Q. Had you seen Mr. Williams up there at Mr. Johnson's house that afternoon?
 A. Until we come back, no, sir.
 Q. You didn't see him there? Why did you go by Mr. Williams' house?
 A. I don't know why Mr. Nichols wanted to go by there. I never—

Q. Why did you get in the car with Mr. Nichols to leave Mr. Johnson's house?
page 51 } A. Mr. Nichols said: "Come on and go with me and ride about some." I didn't know what they wanted to do.

Q. When you left Mr. Johnson's house you went to ride about and you didn't know where you were going or what you were going to do?

A. I didn't know where he was going.

Q. Well, then, you knew when you got to Mr. Williams' house, didn't you?

A. He said: "Mr. Williams, come on and go with me."
Mr. Williams said: "All right."

Q. Where was Mr. Williams when you got there?

A. He was at home, sitting in the yard.

Q. Didn't say what for, did he?

A. Mr. Nichols didn't tell him; I never heard him. Mr. Williams was there; he may have heard it.

Q. So all three of you just got in to go riding about? Well, where did you go from there?

A. Went by Mr. Nichols'.

Q. By Mr. Nichols' house?

A. Went by Mr. Nichols'.

Q. And went straight to Mr. Francisco's?

A. Yes, sir.

Q. Did you have to ride about to get there, or did you take the straight road and go on until you got there?

A. It was a straight road, about straight..

page 52 } Q. How far from there was it?

A. From where Mr. Williams lives?

Q. Yes.

A. I reckon about a mile and a half.

Q. You didn't know what you went by Mr. Francisco's for?

A. I went up there to buy some beer.

Q. I thought you didn't know where you were going when you got in the car?

A. Well, I had an idea where he was going.

Q. Where did you get that idea from?

A. Don't we all have ideas? Don't we?

A. Yes. Some people have ideas without any basis, and some have some basis or reason for their idea. What was the reason you had any idea you were going to Francisco's?

A. Well, you go up and down the road and see automobiles just stop to get a drink of beer or get a drink of Coca-Cola. I don't think that is—

EXHIBIT

EXHIBIT

Q. You drink beer, don't you?

A. I don't drink enough to hurt me.

Q. What I asked you was, how did you get the idea that you were going by Mr. Francisco's?

A. Well, everybody has some idea sometimes.

Q. Well, did you have any other ideas that Sunday afternoon?

A. Sir?

Q. Did you have any other idea that Sunday afternoon but that one?

A. That is the only one I had that I remember. I thought it ought to be broke up.

Q. You wanted to break it up?

A. I wanted to break up such doings on Sunday.

Q. Isn't that the reason you went there?

A. That is the reason I went up there.

Q. Then you knew you were going there?

A. I had an idea we was going up there. You get in an automobile and you think you are going to Richmond. You may die before you get to Richmond. You can't tell what you are going to do these days.

Q. Mr. Cauthorne, didn't you know when you left Mr. Williams' that the purpose of your going up there with Mr. Williams and Mr. Nichols was to buy beer so that it could be brought into this courtroom and you could testify that you bought the beer from Mr. Francisco on a Sunday? Isn't that the reason you went up there?

A. I went up there to try and break it up if I could.

Q. Isn't that the reason you went up there, to buy beer on a Sunday so that you could bring it down here to the court house or turn it over to Mr. Nichols to be brought down here so that you could tell this jury that you went in there on a Sunday and bought it?

A. Yes, sir.

page 54 } Q. That is the reason, isn't it?

A. Yes, sir.

Q. Why didn't you tell the jury that to start with?

Witness stood aside.

Mr. Simpkins: That is the Commonwealth's case.

The Court: Have you any further evidence?

Mr. Simpkins: No, sir, that is all.

page 55 }

I. O. KEETON,
a witness introduced on behalf of the defendant
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Haw:

Q. You are Mr. I. O. Keeton?

A. Yes, sir.

Q. What is your business, Mr. Keeton?

A. I operate the Wigwam on No. 1 Highway.

Q. Is that a place where they have dancing?

A. Yes, we have an orchestra to dance. Restaurant, complete restaurant.

Q. Restaurant?

A. Yes, sir.

Q. And have you an A. B. C. license for the on and off premises sale of beer?

A. Yes, sir, I have an on and off with beer and on with wine.

Q. You are on the Washington highway in Hanover County?

A. Yes, sir.

Q. How many restaurants and filling stations are there to your knowledge that have a beer license?

Mr. Simpkins: Just one minute. Is that the end of your question?

Mr. Ellis: Yes.

page 56 } Mr. Simpkins: If Your Honor please, I object to that line of examination. The question is not who else is violating the law, if the law is being violated. The question is whether or not this sale was made on Sunday, and the Commonwealth takes the position that as a matter of law it is not a necessity, and no evidence along that line is admissible, and, even if it be material before the jury, that that line of evidence as to what other people are doing is still not admissible.

Mr. Haw: Your Honor, this question of whether or not something is a necessity within the definition of necessity is partial. The question which Mr. Simpkins referred to in his opening statement is the question as to what is considered a necessity in the community in which this thing is done, that is, the County in this particular case, and it involves more than simply the question of whether or not it is something that the statute does not provide for. It takes

I. O. Keeton.

in a great many other considerations; what people in the community consider; that is the best evidence.

Note: Here followed argument.

page 57 } The Court: If I conclude that it is not a necessity as a matter of law, I can control it with an instruction to the jury. I think I will admit it in evidence.

Mr. Simpkins: You think you will admit in evidence what other people have licenses, and so forth?

The Court: I think I will admit in evidence, if they want to show it, that other people sell beer on Sunday.

Mr. Simpkins: Well, it is common knowledge anyway, I think. But I try to keep the record straight.

The Court: Yes. Of course the question that we are going to have to reach when it comes to the finality of this case is whether the sale of beer on Sunday is a necessity—

Mr. Haw: In this community.

The Court:—or not a necessity as a matter of law.

Mr. Haw: And under these present conditions.

The Court: Yes.

Mr. Haw: You are going to let it in?

The Court: I think I will let it in.

Mr. Simpkins: All right, sir.

The Court: I don't want to prejudice this record regardless of what conclusion I may reach ultimately as to whether it is not a necessity as a matter of law.

Note: Last question repeated, as follows:

"Q. How many restaurants and filling stations are there to your knowledge that have a beer license?"

A. That would be hard for me to answer, because I don't know. I imagine there would be 25 or 30 in the County on No. 1 Highway.

Mr. Ellis: Mr. Turner is here. He could give you that exact information.

A. I couldn't do it.

EXHIBIT

C

EXHIBIT

I. O. Keeton.

By Mr. Haw:

Q. That is, according to your estimate, 25 or 30?

A. Yes, I would imagine it would be that much.

Q. Do you know whether or not these licensees, filling stations and stores along the highway, generally looked upon for the sale of beer, sell beer on Sunday?

A. Yes, sir, I think the majority of them sell beer and wine on Sunday.

Q. Yes. Well, now, do you operate a filling station at your place also?

A. No, sir, no gas sold.

Q. You operate a restaurant?

A. Yes, sir.

page 59 } Q. And also, I understand, you have a dance hall, and restaurant?

A. Yes, sir.

Q. Now, the people that come to your place: how do they travel ordinarily?

A. Why, our day business is practically 100 per cent tourist.

Q. Practically 100 per cent tourist?

A. Yes, just going through the County.

Q. Driving automobiles?

A. Yes, from north and south.

Q. And the other people that come there at night are—?

A. Ninety-nine per cent Richmond people.

Q. Richmond people?

A. Yes, sir.

Q. And how do they come out there? How do they travel?

A. Drive out in automobiles.

Q. In automobiles?

A. Yes, sir.

Q. The tourists and your general customers outside of the tourist trade, I understand, all travel by automobile?

A. They all come by automobile.

Q. Well, now, is it the custom of the general public—the tourist trade as well as your other customers, to buy beer on Sunday as well as on other days?

Mr. Simpkins: Just a minute—

page 60 } Q. I will change that question.

Mr. Simpkins: Go ahead, if you are going to change it.

EXHIBIT

C

I. O. Keeton.

Q. What per cent, we will say, of the tourist trade, as well as the general public who come to your place on Sunday, call for beer?

Mr. Simpkins: Just one minute again.—

Mr. Ellis: How many people come to his place? Fifty per cent would be large, but it might be a small number.

The Court: I think it is sufficient to show that people ask for beer and they sell beer.

Mr. Simpkins: It should first be shown how many customers there are.

Mr. Ellis: You can do that on cross examination.

By Mr. Haw:

Q. About how many people do you have at your place on an average Sunday?

A. Sunday?

Q. Sunday.

A. Sunday is a little better average than week days.

Q. Just how many people would you say?

A. Including the wine and ale trade?

Q. Yes, those coming on Sunday.

A. I imagine we have 300 people on a Sunday; maybe more.

page 61 } Q. What percentage of those 300 people that come to your place, that come to your place as tourists, and also as persons that come there for supper at night from the locality, demand beer or wine on Sunday when they are there?

A. Well, I have never figured it out, but—

Mr. Simpkins: Just confine it to beer, if Your Honor please.

The Court: Just confine it strictly to beer.

Q. Yes.

A. I will say half of them will ask for beer on a Sunday, and that is leaving wine out.

Q. In your experience as a keeper of restaurants—How long have you been keeping a restaurant?

A. Four years.

Q. In your experience of four years, your experience with the traveling public that come to your place—

EXHIBIT

C

I. O. Keeton.

The Court: Now, you have got him on direct examination. That is going to be leading.

Q. Cut out that question. What is your experience with respect to the demand for beer by the traveling public with relation, say, to their meals, and so forth, that they take at your place? What is that experience with reference to the traveling public?

Mr. Simpkins: If you have decided he can go into that type of thing I will just stop objecting.

The Court: I think I will let him show that. It is ultimately going to come to a question of law as to whether this thing is a necessity or not.

Mr. Ellis: I would like to be heard before the Court ultimately concludes that it is a question of law. It comes to a question of whether or not—

The Court: Whether or not it is a question of law or whether it is a question that the jury must determine, whether it is a necessity or not. Now, I do not expect to decide—I have got some ideas about the thing, but I do not expect to decide the matter until you gentlemen have a chance to argue the matter, if it is going to be a question for the jury to determine.

Mr. Haw: They should find the facts.

Mr. Simpkins: Your Honor, then that does not let the bars down for anything?

The Court: It does not, but they have a right to introduce evidence to show what the conditions are before they started the business and since the business has been operated, I think you ought to confine it to what the conditions were before and what the conditions have been since, along the line indicated in the Lakeside Inn case. You all
page 63 } are trying to bring this within that case and the Pirkey case also. Well, the Pirkey case, you can bring yourselves within what the Court of Appeals said, not what the evidence—

Mr. Ellis: There wasn't any evidence in that.

The Court: There was—it was on an agreed statement of facts.

By Mr. Haw:

Q. Cut out that last question. Mr. Keeton, do you find in your restaurant business that persons call for beer as often, we will say, as they call for iced tea?

EXHIBIT
C

I. O. Keeton.

A. For iced tea, yes, sir.

Q. You say as much as they call for iced tea?

A. They will, yes, sir.

Q. Do they drink it with their meals at your place as a part of their meals?

A. Yes, sir.

Q. Rather than a beverage?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. So, Mr. Keeton, your conclusion is that fifty per cent of the people that eat meals at your place drink beer with the meals?

page 64 } A. Yes, sir. That is, as near as I can estimate it.

Q. As close as you can get to it?

A. I could bring records to show it, for that matter, as to what it would be.

Q. What per cent of the people that come there that do not eat meals drink it?

A. Well, now, for beer and wine, if you will allow me to answer the question—

Mr. Haw: Just beer. Just confine yourself to beer.

A. What percentage?

Mr. Ellis: If Your Honor please, I submit that the question with respect to wine is revelant; just a drink of the same character. If, for example, we were dealing with the other indictment, on the question of selling Coca-Cola, Pepsi-Cola is on the same basis as Coca-Cola.

The Court: Yes, I think that is on the same basis.

Mr. Haw: Beer and wine.

A. I would say 75 per cent of the people that come to my place drink beer and wine.

Mr. Ellis: Beer or wine, one?

A. Yes, sir.

Q. What per cent of them that come that do not eat meals? Is that what you mean?

EXHIBIT
C

I. O. Keeton.

A. I say, all of them. Seventy-five per cent of everyone will drink beer or wine.

Q. What per cent of the 300 people that come there on Sunday buy beer or wine to take away with them?

A. Very little. In fact, we don't have off-premises wine.

Q. You don't have off-premises wine? You have an off-premises beer license, though?

A. Yes, sir.

Q. And very few people buy beer and take it away with them?

A. Very few.

Q. And your conclusion, from your testimony, is that beer and wine are served along with meals, as a part of the meals, usually?

A. Yes, sir.

Q. But you know nothing about buying it to take off premises?

A. Yes, I have off premises beer.

Q. But you don't sell but very little of that?

A. Very little.

Mr. Haw: They only do that for the purpose of evidence.

Q. You operate the Wigwam, which is popularly called a night club?

A. Well, yes, night club and restaurant, we will say.

Q. And you have dances there on Saturday night?

A. We have dances there six nights a week.

Q. Six nights a week?

page 66 } A. Yes, sir.

Q. Including Saturday night?

A. Yes, sir.

Q. And what time do you close on Saturday night?

A. We close at twelve now.

Q. Twelve?

A. In fact, we stop the dances at twelve.

Q. What time do you stop selling beer on Saturday night?

A. Twelve o'clock.

Q. What time do you start on Sunday morning?

A. We don't open until eleven-thirty.

Q. You start selling then?

A. Yes, sir.

Q. And Sunday is your biggest day?

A. No, sir.

Q. Saturday is your biggest day?

I. O. Keeton.

A. Yes, sir.

Q. Sunday is next?

A. No, sir, Friday.

Q. Saturday, Friday and Sunday?

A. Yes, sir.

Q. So that stopping the sale of beer in Hanover County on Sunday would materially reduce your profits, wouldn't it?

A. I would lose 75 per cent of my tourist business.

Q. If we stopped it?

page 67 } A. Yes, sir, my meal business.

Q. And that is chiefly why you are down here today, looking after your business?

A. Looking after my business.

RE-DIRECT EXAMINATION.

By Mr. Haw:

Q. To what extent do you sell beer and wine without meals? I mean, what percentage of the people that come there who do not eat anything?

A. Well, our night business, there are very few meals; we serve a few sandwiches; very few dinners are served at night. The majority of them drink beer and wine.

Q. At night?

A. Yes, sir.

Q. Do they usually buy sandwiches along with it, or something like that?

A. Oh, yes, they buy sandwiches along with it.

Q. But they don't eat full meals?

A. We serve them, but very few are ordered.

Q. But during the daytime, the tourist trade—

A. Is meals.

Q. Practically all the beer and wine that is sold is with meals, I understand?

A. Yes. Of course we serve sandwiches if they ask for them.

page 68 } Q. I understand from you—I don't mean to lead the witness—that the majority of the beer that is served with meals is as a part of the meal and not as a beverage?

A. Well, in some cases it is served as a beverage off the counter.

Q. If they ask for it?

A. If they ask for it instead of milk or some ten-cent drink, we will allow beer or wine.

Q. In other words, it is served as a food, as a part of the meal?

A. Yes, sir.

Q. At your place?

A. Yes, sir.

RE-CROSS EXAMINATION.

By Mr. Simpkins:

Q. Now, isn't it true also, Mr. Keeton, that the 75 per cent of the people that come there in the evening and don't buy meals but buy beer are people who are there attending a dance and sitting at tables?

A. They buy it—I would say half of the people will eat sandwiches at night.

Q. With the beer?

A. Yes, sir.

Q. And those people that you are speaking of are attending a dance at your place?

A. Yes, sir.

page 69 } Q. Practically a hundred per cent of them, aren't they?

A. Well, yes, at night.

Q. All of them?

A. Yes—not all of them. We have tourists that stop at night.

Q. Have a few tourists stop at night?

A. Yes, sir.

Q. But practically all of them attend the dance?

A. I would say 90 per cent of them.

Q. But you don't have dancing on Sunday?

A. No, sir.

Witness stood aside.

page 70 } M. G. FRANCISCO,
the defendant, introduced as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. Your name is M. G. Francisco, and you are the defendant in this prosecution, are you not?

A. Yes, sir.

Q. Is this Mrs. Francisco who sits here by me, your wife?

A. Yes, sir.

Q. Where do you and Mrs. Francisco live?

A. Near Beaver Dam.

Q. In Hanover County?

A. Yes, sir.

Q. Do you operate a store at that place?

A. Yes, sir.

Q. Is that at your home?

A. Very close to my home.

Q. You do not reside in the same building?

A. No, sir.

Q. —That your store is operated in?

A. No, sir.

Q. Do you have a merchant's license?

A. Yes, sir.

page 71 } Q. Do you have a license to sell wine and beer?

A. Yes, sir.

Mr. Simpkins: It has all been stipulated.

Mr. Ellis: Licenses all stipulated. Cut that question out.

Q. How long have you been engaged in the several businesses in that community, Mr. Francisco?

A. About ten years.

Q. Do you recall the Sunday, September 7th, when Mr. Williams and Mr. Cauthorne each made the purchase of a bottle of beer at your place?

A. I do.

Q. Who made the sale?

A. I did.

Q. What purchases did Mr. Cauthorne make in there that day?

A. Beer, chewing tobacco, and I believe a bottle of Coca-Cola.

Q. Do you recall the order in which he made those purchases?

A. Yes, I do. I think he called for a bottle of beer—at least, I know he called for a bottle of beer, and I think a bottle of Coca-Cola for a child.

Q. And what did you do?

A. I asked him if there was something else, and he said yes, he wanted a plug of chewing tobacco.

M. G. Francisco.

Q. Was Mrs. Francisco in your place of business
page 72 } during that day?

A. Yes, sir.

Q. Was the Sheriff of Hanover County in your place of
any time during that day?

A. Yes, sir, he was there at the time.

Q. He was there at the time this happened?

A. Yes, sir—what?

Q. He was there at the time this happened?

A. Yes, sir.

Q. In what manner was your place conducted there on the
Sunday with respect to orderliness or disorder?

A. Well, it was very orderly. We had a right big crowd in there at the time, but everything was very orderly.

Q. Did you on that Sunday sell beer for consumption on the premises?

A. No, I did not. I sold it for consumption off the premises.

Q. You have a right under your license to sell it for consumption on premises, don't you?

A. Yes, I do, but our place is small and I don't have very much help, and that is why I can handle it better to wait on customers that come in and let them take their beer home.

Q. Do you sell it for consumption on premises during the week days?

A. Yes, I do.

page 73 } Q. Have you ever made it a practice to sell
for consumption on premises on Sunday?

A. Not for four years.

Q. You did four years ago?

A. Yes, sir.

Q. You discontinued that practice four years ago?

A. Yes, sir.

Q. Why?

A. Well, the best way—the business was larger, and I could wait on more customers by selling it off premises on Sunday.

Q. Do you sell sandwiches?

A. Yes, sir.

Q. Do you have any tables or chairs in your place of business?

A. Yes, sir.

Q. The A. B. C. Board requires you to have tables and chairs?

M. G. Francisco.

A. They do where you have an on-premises license. We have had an on-premises license for over four years.

Q. Do you sell gas and oil?

A. Yes, sir.

Q. Soft drinks?

A. Yes, sir.

Q. In other words, you do not keep your store open just for the sale of beer?

A. No, sir.

page 74 } Q. That is not your sole business?

A. That is right.

Q. The sale of beer is one of the things that you do in operating your gasoline and filling station business?

A. That is right.

Q. You sell soft drinks, cigarettes, and tobacco, and things of that kind on Sunday?

A. Yes, sir.

Q. Is that what your customers demand on that day?

A. Yes, sir. That is what the public calls for.

Q. And you supply the trade?

A. Yes, sir.

Q. You don't run a general merchandise store on Sunday, do you?

A. No, sir.

Q. You do on week days?

A. Yes, sir.

Q. How long did the Sheriff remain at your place of business on this particular Sunday?

A. Possibly an hour.

Q. Did you make any sales of beer or wine while the Sheriff was there?

A. Yes, I am sure I did.

Q. Has the Sheriff been to your place of business on any other Sundays any time near this Sunday?

page 75 } A. Well, he has been there numerous times. He has been there very frequently.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Francisco, you state that the law requires that you have tables and chairs and serve sandwiches, or the A. B. C. Board; which did you say?

A. The A. B. C. Board.

M. G. Francisco.

Q. You don't have any tables and chairs for serving sandwiches, though, do you?

A. Yes, I do.

Q. Who told you you had to have tables and chairs to serve sandwiches?

A. The A. B. C. Board.

Q. Who with the A. B. C. Board?

A. Well, Senator Miller is Chairman.

Q. That was when you received your license originally?

A. Yes, sir.

Q. And that was how many years ago?

A. Possibly four years ago.

Q. Four years ago? They haven't told you since that time, though, have they?

A. No, they have not.

Q. Do you have actual tables to serve sandwiches in your place?

A. Yes, sir, I do.

Q. In the main part of the store where you serve beer?

A. Yes, sir.

Q. How many?

A. Two tables and six chairs.

Q. Two tables? How large are the tables?

A. Oh, I think they are—I don't have the dimensions, but I think they are about as large as the table right there.

Q. Just sitting over against the wall somewhere, aren't they?

A. Well, they sit to the wall, but what I mean, there are three seats to it.

Q. Three seats to it?

A. And if we need to pull them out, why, we can do it and make a seat for another person.

Q. The chairs are not at those tables, are they?

A. Yes, they are.

Q. Aren't the chairs sitting around the store that customers generally sit in?

A. Well, some of them might be. Customers may take them out.

Q. You don't contend that you are operating a restaurant, do you?

A. Yes, I do.

Q. What meals do you serve?

A. We serve sandwiches and beer.

Q. What sandwiches do you serve?

EXHIBIT

C

M. G. Francisco.

A. Well, sandwich meat and cheese.

page 77 } Q. Sandwich meat and cheese?

A. Sandwich meat and cheese sandwiches.

Q. And those are two of the meats that you sell in your grocery business?

A. Well, I do sell some in my grocery business, too.

Q. You don't operate this sandwich business in any way separate from your grocery business?

A. Oh, yes, I do. We make sandwiches to serve people.

Q. How much do you charge for them?

A. We charge ten cents for a sandwich.

Q. You only make two kinds, sandwich meat and cheese?

A. Well, we have different kinds of meat at different times.

Q. You don't serve coffee?

A. No, we don't.

Q. Don't serve iced tea?

A. No, only soft drinks and beer.

Q. Only soft drinks and beer, and sandwiches, cheese and different sandwich meats you happen to have?

A. Yes, sir.

Q. —In your store business? Now, isn't it true also that the sandwiches—that on Sundays, that you claim that you have been selling for off premises consumption, that the people have been buying the beer and taking it right outside on your premises, and wine also, and opening it and drinking it out there and coming on back in and getting

page 78 } some more?

A. Not to my knowledge. They tell me that they take it home or take it on their picnic or wherever they go.

Q. Well, on Sundays there, prior to September 7th, weren't there a lot of people around the place there, in the road, and in the place, that would give evidence of having been drinking beer?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No, sir. I am inside of the building, and there has been a special officer around there since the middle of the summer, and I have not heard any complaint or any arrest being made. I would judge that they were not drinking it around there.

Q. Who is the special officer?

A. Mr. Nichols.

Q. And as far as you know, you sell it inside, and they

EXHIBIT

C

M. G. Francisco.

take it outside of the door, and whether they drink it out there and come back for some more, you don't know?

A. I know they don't drink it around my premises. I am positive of that, because I don't allow them to.

Q. On Sundays?

A. Yes, sir.

Q. Do you know why the Sheriff was up there that day, Mr. Francisco?

page 79 } A. Yes, I think so.

Q. Why?

A. I think he came to get a soft drink for his wife.

Q. Why did he stay about an hour?

A. Well, he was just—I suppose, met some friends, and was talking; I don't know.

Q. Who were the friends he met?

A. There were right many people there. I don't know just—I don't know.

Q. Right many people there at the time?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By Mr. Ellis:

Q. Mr. Francisco, what means of refrigeration do you have for your beer?

A. I have a Kelvinator.—

Q. Electric?

A. Water cooler.

Q. Electrically operated?

A. Yes, sir, and then I have a dry refrigeration box for meats, and so forth.

Q. Is that electrically operated also?

A. Yes.

Q. All of your refrigeration is electrically operated?

A. Yes, sir, electrically.

page 80 } Q. Most of your customers and people in that vicinity do not have refrigeration, do they?

A. Very few.

Mr. Simpkins: Wait a minute—

A. Some of them do and some of them do not.

Mr. Simpkins: Just a minute. Objection. What is the purpose of that line?

EXHIBIT

J

Mrs. M. G. Francisco.

The Court: That question is leading, Mr. Ellis.

Mr. Ellis: Of course it was leading. It wasn't on any material point. I admit it was leading.

Q. I will ask you.—What is the nature of the community in which you live with reference to being rural or urban?

A. Well, we have electric light through on the main highway, but the people that live off from the main highway don't have it, with the exception of a very few that have built a private line, which is right expensive, you know, to get a private line.

Q. What would you say would be the situation with respect to the majority, as to whether they have or do not have it?

A. I would say that they do not have refrigeration.

Q. Is ice delivered in that community, that locality?

A. No, it is not.

Q. If they don't have refrigeration for beer, they don't have it for anything else, do they, Mr. Francisco?

Mr. Simpkins: I think that is a conclusion.

Witness stood aside.

page 81 } MRS. M. G. FRANCISCO,

a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. You are Mrs. M. G. Francisco?

A. Yes, sir.

Q. How far is your home place, where you reside, from the building in which your husband operates his store or restaurant or filling station?

A. It is not as far as that building out there. About half as far, perhaps.

Q. About half as far?

A. Something like that. It is almost at the end of the yard. Just a little space, the yard is about half the distance, and then there is much more—

Q. But in the same yard?

A. Yes, sir, in the same yard.

Q. It is on the road that leads from Beaver Dam to Tylers, is it not?

EXHIBIT

C

Mrs. M. G. Francisco.

A. Yes, sir.

Q. In the upper end of Hanover County?

A. Yes, sir.

page 82 } Q. How many people compose your family?
 A. My family! I have two aunts that live with me, and I have eight children. My oldest son is not home, but the rest of them I have there.

Q. Well, when you answer my questions, you address your remarks to the jury. They are the ones that have got to hear you.

A. Yes, sir.

Q. Look at them. How many of the children live in the home there next to the store?

A. They all live in the home, but the oldest boy is in Florida at the time. But it is eight children in all.

Q. What are the ages of them?

A. Well, my son is 22, that is the one in Florida. The oldest girl is 18. She is away at school right now, but she lives there. And the next girl is 16. Then I have a boy 14, a boy 12, a girl 10, a girl six, and four.

Q. And that family, including your two aunts, reside there near the store and make their home there?

A. Yes, sir.

Q. Are they there on Sundays?

A. Yes, sir.

Q. Do you assist your husband in the operation of the store?

A. Yes, sir.

Q. Were you in his store or filling station or restaurant on this particular Sunday on which Mr. Canthorne and Mr. Williams made these purchases?

page 83 } A. I was in there a good portion of the afternoon.

Q. Do you recall whether you were there when they made the purchases or not?

A. Well, they didn't make the purchases from me, but I think I was in the store or was walking through the store as they came in; I have a faint recollection of seeing them, but they didn't make any impression on me whatsoever; but I had been working in there for a couple of hours.

Q. In what manner was the store being conducted and the crowd conducting itself on this Sunday afternoon?

A. Well, I didn't see anything disorderly from anybody. It was all right.

Q. Do you recall seeing the Sheriff?

EXHIBIT C

EXHIBIT C

M. G. Francisco.

A. Yes, sir, I recall. I think I sold the Sheriff a soft drink.

CROSS EXAMINATION.

By Mr. Simpkins:—

Q. Mrs. Francisco, you sold beer to some other people that Sunday, if you didn't sell it to these two, didn't you?

A. I am sure I must have, in that length of time. I can't recall selling beer, but—

Q. You sell more beer on Sunday than you do anything else, don't you?

A. We sell a good deal of soft drinks and ice cream.

Q. Just about how much beer do you sell on page 84 } Sunday?

A. Well, I wouldn't know, because I don't stay in there all day on Sunday, about what we sell on Sunday. We don't open any, never loosen a top.

Q. And you don't know how much you sell on Sunday?

A. I do not.

RE-DIRECT EXAMINATION.

By Mr. Ellis:

Q. How do you pack it? You do pack it?

A. They are in bags, paper bags, just a bottle like that, or two bottles, we put them in a paper bag. But if we were selling a dozen bottles, we would put them in a paper box.

Witness stood aside.

page 85 }

M. G. FRANCISCO,
 the defendant, being recalled to the stand, testified further as follows:

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Francisco, how much beer do you normally sell in a week?

A. Possibly 50 or 60 cases.

Q. Fifty or sixty cases, and about how much of that is sold on Sundays?

A. I have never made a tabulation of it. It would be hard for me to say right off-handed.

Q. One-third of it Sunday? Wouldn't you say one-third?

A. Possibly so.

Q. Possibly a third?

M. G. Francisco.

- A. A third might be a little too high.
 Q. A third might be a little too high? You think between a fourth and a third?
 A. Possibly so.
 Q. You sold other beer on this Sunday; this was a normal Sunday we are talking about here?
 A. Yes, sir.

By the Court:

- Q. Well, now, Mr. Francisco, you have been sold page 86 } ing beer there on Sunday under the belief that you had a right to sell it on Sunday, haven't you?

A. I have.

By Mr. Simpkins:

- Q. There is one more question I have: You don't do any business, Mr. Francisco, of any consequence at all with tourists, do you?
 A. Selling meals to tourists? No, we don't. We don't have many tourists on that road.
 Q. You don't have many tourists on that road?
 A. No, sir.
 Q. Practically all of your business is of a local nature?
 A. Yes, that is right.

RE-DIRECT EXAMINATION.

By Mr. Ellis:

- Q. Have you ever undertaken to conceal any of these from the Sheriff or other police officers of the County who visited your store?
 A. No, I have not. I have sold to officers on Sunday.

Mr. Simpkins: No contention along that line at all.

A. I have sold to a Judge on Sunday.

The Court: Not this one.

- A. I didn't say which one, but I have sold to a Circuit Court Judge on a Sunday.

Mr. Haw: We would like to know where you buy yours.

The Court: Just a minute. I do not mean to

R. K. Turner.

- page 87 } reflect on Mr. Francisco at all, but I do not think I have ever been to his place.

Mr. Haw: He didn't say that.

Q. You didn't mean that this Judge—?

A. No, I certainly did not. It was a different Judge. But I have sold to a Circuit Judge.

Q. You have sold to a Circuit Judge, but not this one?

A. Yes.

Q. We won't ask you to mention his name, who he is.

Mr. Haw: It is perfectly legal to drink it on a Sunday or any other day.

Witness stood aside.

page 88 }

R. K. TURNER,

a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. Will you please state to the jury your name and occupation, Mr. Turner?

A. R. K. Turner. A. B. C. Inspector, for the Virginia Alcoholic Beverage Control Board, Richmond.

Q. In the discharge of your duties, is Hanover County a part of your territory?

A. It is, yes, sir.

Q. Can you tell the gentlemen of the jury how many people have licenses to dispense beer in Hanover County?

A. There are 61 licensed establishments in Hanover County.

Q. Is it a part of your business to visit all those 61 licensees and see whether or not they are running in an orderly and proper manner?

A. That is one of my duties, yes, sir.

Q. That is one of your duties? That is your main duty, isn't it?

A. One of the main duties, yes, sir.

Q. And you have been discharging that duty and visiting these places in Hanover County for how long?

page 89 } A. Since January, 1939.

Q. Have you had occasion to visit Mr. Francisco's during that time?

Mrs. Mary R. Winn.

A. I have.

Q. Do you know how many of those licensees dispense or sell beer on Sunday?

A. I have not made my observations throughout the entire County of the licensed establishments on Sundays, but of my own knowledge, approximately 80 per cent of the 61 in the County are selling on Sunday.

Q. And you don't know whether the other twenty are or not, is that it?

A. I do not, no, sir.

Q. So, as I understand it, you know that 80 per cent of the 61 are selling on Sunday, and how many more, you don't know?

A. I do not.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. How do you happen to know that those 80 per cent are selling, Mr. Turner? You don't work on Sunday, do you?

A. Occasionally I do work on Sunday. I don't on Sunday in the remote sections observe the establishments, but on the main thoroughfares—

Q. Have you visited 80 per cent of them on Sunday?

A. I have, yes, sir.

page 90 } Q. And you say that 80 per cent of them on some Sundays have sold beer? That is what you meant?

A. Yes, sir.

Witness stood aside.

page 91 } MRS. MARY R. WINN,
a witness introduced on behalf of the defendant
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Q. Mrs. Winn, where do you live?

A. I live on the Washington Highway, just over the line in Hanover County.

Q. What business do you operate there?

A. I operate a place called the Diner. Just a—well, I guess it would be classed more as a night club and restaurant as any other type of business.

Mrs. Mary R. Winn.

Q. How big a place have you there from the standpoint of the people you can seat there in the restaurant?

A. The main part of the building is about 32 feet square.

Q. And what licenses do you have?

A. I have a mercantile license, tobacco license, soft drink license, restaurant license, an A. B. C. license for beer and wine both on premises and off for both of those.

Q. How long have you been operating there?

A. About two years and a half.

Q. About how many customers do you have on an average Sunday?

A. Well, Sunday is my third largest day in the week. I would not be able to say just exactly how many page 92 } customers I would have. It varies throughout the year. The largest season is from about Easter until the beach season is over. Then the second largest season is in the fall and winter.

Q. Could you give me an idea of the number of people you serve a day there?

A. On Sunday or any other day?

Q. On Sunday, on a busy Sunday, we will say.

A. Well, on a busy Sunday, probably about 200, something like that.

Q. Now, what per cent of the persons who come to your place on Sunday are tourists, and what percentage are local people who come there from Richmond or otherwise for amusement and refreshment?

A. That is just a little difficult to say. That varies also.

Q. I just want you to give an estimate, as near as you can get to it.

A. I will say about one-third of the people that we serve would be tourists, in most seasons. Sometimes it is greater than that.

Q. You serve meals too?

A. Yes, sir.

Q. What percentage of the persons who come to your place on Sunday and eat meals there order beer with their meals?

A. I never thought of it in the sense of percentage before.

page 93 } Quite a number of people drink beer with their meals, or drink beer just before the meal. A good many of my customers drink a glass of beer while they are waiting for a meal to be served. I wouldn't be able to say just exactly the percentage, but it is a good number of people.

Q. Do a good many come there also who do not get any

Mrs. Mary R. Winn.

meals but just get a bottle of beer or a glass of beer?

A. Well, a great many people do come there and just get a bottle of beer or a sandwich and a bottle of beer; some times just a bottle of beer.

Q. And does that same apply to wine? Is wine drunk with or without meals generally?

A. We sell wine and beer both. A few people like it with meals and a few people like it without. We sell a great deal more beer than we do wine.

Q. Please state whether or not the general public, traveling public, usually demands beer when they come to your place?

A. Yes, very positively so. Yes. In fact, I sell draft beer out there on the highway, and that is a little unusual, to be outside of a city.

Q. And you say that applies to the general traveling public who patronize your place?

A. Yes, sir, I will say definitely so.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. You said about one-third of the people that page 94 } come on Sunday were tourists. Most of the other two-thirds are from Richmond, aren't they?

A. I have quite a little local trade from Hanover, but I have never tried to figure it out in percentages, Mr. Simpkins. I just don't know how to answer that question in percentages. But I do have quite a little of Hanover people, and people who formerly lived in Hanover who now live down between my place and Richmond in Henrico County, but a great many of my customers are from Richmond.

Q. A majority of them other than tourists, a majority of the remainder are from Richmond?

A. A pretty good part, yes. I would not like to say a majority. A great many of them are. I would not like to say a majority. I have never thought to figure it just exactly.

Q. You sell very little beer on Sunday for off-premises consumption, don't you?

A. I sell only a small quantity of beer for off-premises consumption at any time.

Q. You are really in the restaurant or night club or dance hall business?

A. I do have a floor upon which people can dance. I don't

EXHIBIT
B

Mrs. Mary R. Winn.

operate an organized dance, if you want to put it that way. People come to my place and spend the evening for recreation purposes, and they do dance.

page 95 } Q. Most of the wine and beer that you sell at your place is in connection with either a customer that is dancing or with meals, isn't that true?

A. Would you repeat that, Mr. Simpkins?

Q. Most of the customers that purchase beer or wine at your place purchase it in connection with a meal which they have expected to purchase or in connection with an evening of dancing or a short time of dancing?

A. Yes, sir.

Q. As a part of their recreation?

A. Yes, sir, I would say so.

Q. About what percentage of the beer that you sell is sold on Sunday?

A. Well, at the present time business is quite dull, from Monday through Thursday, and Friday, Saturday and Sunday are the largest days of the week. In fact, you couldn't operate at all unless you had those three days. Saturday is the largest day. Friday is the next largest, and Sunday is the third largest.

Q. Then would you say over half of your business is done in those three days?

A. I would say three-fourths of it was done in those three days.

Q. Three-fourths of it is done in those three days?

page 96 } A. At the present time. That has not always been true, but it is at the present moment.

Q. And about one-fourth of the three days is done on Sunday, I presume?

A. I am not a very good mathematician, but I will agree that that is about right.

Q. And you, of course, are down here, as Mr. Keeton, trying to save your Sunday business?

A. No, sir, I didn't have any idea that I would be called as a witness when I came down here. I came down because I was interested in the entire subject-matter from the standpoint of the fact that I am operating that business, and I came here to the trial in this Court merely as a spectator. I was asked if I would be a witness and I consented out there.

Q. But you are interested in the outcome?

A. Of course I am interested in the outcome.

Witness stood aside.

EXHIBIT
C

page 97 {

ROBERT STONE,
a witness introduced on behalf of the defendant,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. What is your name?

A. Robert Stone.

Q. You live in the town of Ashland?

A. Yes, sir.

Q. Do you operate a filling station, lunch room, beer parlor?

A. Yes, sir.

Q. Where?

A. Just outside of the corporate limits of Ashland, at the intersection of Route 33 and No. 1 Highway.

Q. That is on the corner of No. 1 Highway and Hanover Court House Road?

A. That is right, yes, sir.

Q. What is the name of your place of business?

A. College Shoppe.

Q. How long have you been operating that place?

A. I have been there a little over three years.

Q. You run a filling station in connection with it?

A. Yes, sir.

Q. Restaurant?

page 98 { A. Yes, sir.

Q. Lunch room?

A. Yes, sir.

Q. Sell soft drinks?

A. Yes, sir.

Q. Wine and beer?

A. Yes, sir.

Q. Do you sell those articles on Sunday?

A. Yes, sir.

Q. Doesn't the Sheriff pass there every time he comes from his home to Hanover Court House, by that corner?

A. If he comes from Hanover Court House he comes right close to it, yes, sir.

Q. And State motor vehicle police officers that patrol that road park right there, out there in front of your place of business, don't they?

A. Yes, sir.

Q. Sundays and other days?

A. Yes, sir.

Q. And there are a good number of State police officers

Robert Stone.

who patrol that Washington No. 1 Highway from Richmond to Ashland, aren't there?

A. Yes, sir, there are quite a few there.

Q. Sometimes two or three of them are sitting out there at once, aren't they?

page 99 { A. Yes, sir, sometimes. Sometimes we have more than that.

Q. You serve both local and tourist trade?

A. Yes, sir.

Q. What per cent of your business is local trade, Mr. Stone?

A. I would say approximately ninety per cent of my business is local trade.

Q. Practically all of it?

A. Yes, sir.

Q. What is the largest day on which you do business?

A. Saturday is my largest day.

Q. And the next day?

A. Sunday.

Q. Sunday. And is your local trade and traveling trade on Sunday about in the same proportions as at other times? About ninety per cent of the Sunday business is local trade also?

A. No, not on Sunday. We have quite a few tourists that are stopping through, people that are traveling through.

Q. What per cent of your Sunday business would you say was local business?

A. I would say it would be about eighty per cent, dragged down a little bit, because we have quite a few soldiers that are stopping in there, that we couldn't say was local trade. I have others on Sunday.

page 100 { Q. Well, how many of your customers in the course of a Sunday who call for a drink to be served are sold beer and wine? What percentage of them?

A. Well, as to that, I would hate to say, because I don't know. I can tell you this: That I will sell as many beers as I will soft drinks.

Q. On Sunday?

A. Yes, sir.

Q. Well, now, are those beers usually served singly or with a meal?

A. We sell quite a few with a meal or with sandwiches, but the greatest majority of mine are sold with a bag of potato chips, or crackers, or something like that.

Q. Like you take a soft drink beverage?

Robert Stone.

- A. Yes, sir, the same way.
 Q. And the trade demands that?
 A. Yes, sir.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Stone, a great number of your customers are college students, aren't they?

A. Very good college student trade, yes, sir.

Q. You enter to the college students, and that is why you call your place the "College Shoppe"?

A. Yes, sir.

Q. About what percentage of your business is page 101 } with college boys? Randolph-Macon College, that is what I am speaking of.

A. Right off-hand, I couldn't say.

Q. Most of those boys are under 21, aren't they?

A. We have quite a few that are over 21.

Q. And of course you don't sell to those under 21 any beer?

A. Not if I know it. I ask them to prove to me that they are over 21.

Q. If a group of men, college students, come in, we will say five or six, one or two of them might be over 21 and three or four under 21?

A. Sometimes they might be, of course.

Q. That is the usual custom, that boys come in in groups? That is the usual way they come? Some come to purchase food, some kind of a sandwich?

A. Yes, sir.

Q. And those that cannot purchase beer usually purchase soft drinks?

A. Yes, sir.

Q. About what percentage of your business, would you say, is off-premises business?

A. That is Sunday, you are still talking about?

Q. I am talking about beer, now, and wine.

A. A very small percentage.

Q. A very small percentage? Most of your page 102 } business on Sunday is on premises, with the selling of sandwiches or potato chips or cheese crackers and things of that kind?

A. Yes, sir.

EXHIBIT

C

EXHIBIT

C

M. G. Francisco.

Q. You run a soda fountain too there, do you?

A. No, sir, I have no soda fountain.

Q. You have no soda fountain?

A. I have bottled drinks.

Q. All bottled? And you have been running it there how long?

A. A little over three years.

Q. Were you running the business there at the time the State A. B. C. Board put in a beer ban on Sunday for ninety days?

A. No, sir.

Q. You were not running it at that time?

A. No, sir.

Q. Did you know anything about it?

A. No, sir.

Q. Do you know whether that was done or not? Were you running a business somewhere else?

A. No, sir.

Q. You were not?

A. No, sir.

Witness stood aside.

page 103 }

M. G. FRANCISCO,

the defendant, being recalled to the stand, testified further as follows:

DIRECT EXAMINATION.

By the Court:

Q. Mr. Francisco, I would like to ask you one question.

Do you operate your store and business on Saturday?

A: Yes, I do.

Mr. Simpkins: He stated that he operated every day in the week, I think. I tried to cover the question, Judge.

Witness stood aside.

page 104 } F. R. BAKER,
a witness introduced on behalf of the defendant,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Haw:

Q. What are your initials?

A. F. R.

Q. F. R., and where do you live, Mr. Baker?

A. In Mechanicsville.

Q. Do you have your home there?

A. Yes, sir.

Q. What business are you engaged in?

A. Filling station and lunch room. Two separate places.

Q. Filling station and lunch room? Have you a wine and beer license at either one or both of these places?

A. I have a wine and beer, on and off, at the lunch room.

Q. You haven't at your filling station?

A. No, I haven't at the filling station.

Q. What is your trade composed of; purely local, or partly tourist?

A. Well, we have—I reckon what you would call "other county" trade. I have a lot of trade from the Northern Neck and a lot of trade from Richmond, and then have right much local trade.

page 105 } Q. A good many people in the community deal there at your place?

A. Yes, sir.

Q. Do you operate on Sunday?

A. Yes, sir.

Q. Do you sell beer on Sunday?

A. Yes, sir.

Q. What is the demand of the traveling public and the people generally who come to your restaurant on Sunday in regard to beer? Do they expect it or don't they expect it?

A. They expect beer, and would be very much disappointed if they couldn't get it. A lot of people ride around on Sundays. They work every day in the week and drive around on Sunday and stop to get a bottle of beer and something to eat, a sandwich. We serve a lot of lunches and sandwiches. And they go ahead. On rare occasions I ever see anybody under the influence of alcohol that drinks on Sunday.

Q. How close do you operate to the Trial Justice Court where it generally sits?

F. R. Baker.

A. Well, it is practically up over me.

Q. He is practically over your head, isn't he?

A. Yes, sir.

Q. Are the County officers, police officers, and Sheriff there frequently?

page 106 } A. Yes, sir, real often.

Q. Are they there on Sunday?

A. Yes, sir.

Q. The Commonwealth's Attorney, I believe, lives very close to you?

A. He comes to see me too.

Q. Is he one of your customers?

A. Yes.

Q. Has any objection been made down there to your operating on Sunday?

A. I have never heard of one.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Baker, you run a general lunch room, general restaurant?

A. Yes, sir.

Q. And mostly your beer and wine is served in the restaurant with either a sandwich or lunch, or a bag of potato chips or cheese crackers or something like that?

A. Yes, quite a bit of it.

Q. And you do a large curb service business too, don't you? On Sundays and other days?

A. Yes, sir.

Q. Serving sandwiches at the curb with drinks, Coca-Cola and pop and so forth?

page 107 } A. Yes.

Q. You sell very little beer, don't you, Mr. Baker, for off-premises consumption, particularly on Sunday?

A. I do not in winter time, but in the summer time I sell a lot of it off premises for fishing parties, picnics, and things like that. Most of that is on Sunday.

Q. Most of that is on Sunday?

A. Yes.

Q. Most of that is bought early Sunday morning to take down to the rivers and places like that?

A. That is right.

Frank Bradley.

Q. Isn't most of your business, certainly over half of your business, Richmond business, people coming out from Richmond that come to get drinks or Coca-Cola and eat after dances, and things of that kind?

A. Well, I wouldn't say that. I would say around 40 per cent was Richmond business.

Q. And over half of it is Richmond and tourist, isn't it?

A. Yes.

Q. Very little of it is local, comparatively?

A. It is more Richmond and tourist than it is local, yes.

Q. More Richmond and tourist. You say there have been no complaints about your business on Sunday. You mean there have been no complaints about your business as to your business on Sunday, don't you?

page 108 } A. Yes, that is right.

Q. You do know that there have been a lot of delegations and petitions and so forth to the Board of Supervisors by particular groups of people asking that the sale of beer be stopped on Sunday, don't you?

A. Yes, sir.

Q. You do know that?

A. That is generally known.

RE-DIRECT EXAMINATION.

By Mr. Haw:

Q. And you do know, Mr. Baker, since he has led you on that subject, that the Board of Supervisors, acting in their official capacity, and with authority to ban beer on Sunday, have refused to do so; is that correct?

A. Yes, sir, just a few months ago.

Witness stood aside.

page 109 }

FRANK BRADLEY.

a witness introduced on behalf of the defendant,
being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Haw:

Q. Mr. Bradley, are you Frank Bradley?

A. Yes, sir.

Q. Where do you live, Mr. Bradley?

A. At Ellerson.

Frank Bradley.

Q. What is your business?

A. It is hard to tell you.

Q. Fertilizer business?

A. Fertilizer business, gas and oil, and tourist business, service station.

Q. How many service stations, Mr. Bradley, do you own yourself?

A. Own or operate?

Q. I mean how many do you own?

A. I own nine.

Q. And how many do you operate?

A. Well, four.

Q. Four. And have all of those service stations that you own or operate, have they all beer licenses, or just part of them?

A. The four that I operate have beer licenses.

page 110 } Q. Where are they?

A. One is near Ashland, with hotel trade; one is Restover, on the Washington Highway, and one at Ellerson, and one on No. 2 Highway.

Q. All of those except the one at Ellerson are more or less tourist propositions, aren't they?

A. Yes, sir.

Q. Is the one at Ellerson your store?

A. Yes, sir, the main office.

Q. With reference to your Ellerson store, for instance, take that for the purpose—

A. It is operated a little differently.

Q. What kind of beer licenses have you there?

A. On and off.

Q. On and off. Is your trade there any tourist or practically all local?

A. Practically all local.

Q. Do you operate there on Sunday?

A. Yes, sir.

Q. And the persons that go up there on Sunday, do they mostly buy for consumption off premises or on premises?

A. Mostly, ninety-nine per cent, on premises.

Q. On premises?

By the Court:

Q. That is at Ellerson?

page 111 } A. Yes.

EXHIBIT

C

EXHIBIT

Frank Bradley.

By Mr. Haw:

Q. Will you please state what is the attitude of the public towards the necessity of getting beer on Sunday?

Mr. Simpkins: Wait a minute. Not what attitude the public has.

The Court: What is the demand for it?

Q. Pardon me. What is the attitude of your customers who come there to your place on Sunday in regard to beer?

A. Well, they demand beer. If they don't get it there they go somewhere else and get it, over the Henrico line. If we don't keep open they go to Henrico and get it.

Q. You have beer licenses, you say, for your other places too?

A. That is right.

Q. What is the attitude of the tourist trade that patronizes your tourist homes and filling stations in regard to the sale of beer on Sunday?

A. The attitude is very strong towards it. They raise a fuss because we don't have liquor.

By the Court:

Q. Because you are not an A. B. C. store?

A. Yes, sir. They say they never saw such a State.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Bradley, just one question. Mr. Ellis, page 112 } asked you about the attitude of people that came to the place for beer. Of course they want beer if they come there for it?

A. Sure.

Witness stood aside.

Mr. Haw (To Mr. C. W. Taylor): Will you produce the Supervisors' records?

Mr. Simpkins: If Your Honor please, I want to renew my objection. I think that the Supervisors were not deciding at all whether or not beer was a necessity. That is the only question before this jury, whether it is a necessity. If it is not a necessity under all the evidence here, it is their duty, if it gets to that duty, to convict.

C. W. Taylor.

The Court: That is correct.

Note: Here followed argument.

Mr. Simpkins: I think the jury should go out.

Mr. Ellis: You had all your argument before the jury.

Note: Jury retires from courtroom.

Note: Here followed extended argument.

The Court: I am going to exclude the action of the Board of Supervisors on these petitions, and I will strike page 113 } out from the record any reference to any petitions having been presented to the Board.

Mr. Ellis: To which action of the Court in refusing to admit the evidence of the action taken by the Board of Supervisors, counsel for the defendant excepts, for the reasons assigned, namely, that it is admissible as evidence going to show the community opinion of the community in which this act is alleged to have taken place.

I would like to get Mr. Taylor's testimony into the record, Your Honor.

Mr. Simpkins: Now, the Commonwealth desires to object to this on another ground, that the record of the Board of Supervisors, I having seen it and the other side having seen it, does not show any action at all by the Board. It merely shows a motion and the failure of a second, which could show no action or failure to act on anything properly before the Board of Supervisors.

The Court: All right, put it in.

page 114 } C. W. TAYLOR,
a witness introduced on behalf of the defendant,
being first duly sworn, testified for the record in the absence of the jury as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. Mr. Taylor, you are now and were the Clerk of the Board of Supervisors of Hanover County on July 1st, 1941?

A. Yes, sir.

Q. Did you attend the meetings of the Board of Supervisors held on July 1st, 1941?

C. W. Taylor.

A. Yes, sir.

Q. Please state whether or not the question of the adoption of an ordinance prohibiting the sale of beer in Hanover County came before the Board for its consideration at that time.

A. It did.

Q. Please state whether or not there were delegations before the Board in behalf of and in opposition to that ordinance?

A. There were.

Q. Please state what action, if any, was taken by the Board of Supervisors after the hearing on that matter on that day.

A. A resolution was offered by Mr. Thompson page 115 } prohibiting the sale of beer and wine in Hanover County on Sunday, which received no second and was lost.

Q. I will ask you if you will file a certified copy of the minutes to which you refer in the record.

A. Yes.

Mr. Simpkins: I understand that the Court has ruled out all that evidence.

The Court: Yes.

Note: Here followed argument.

The Court: Produce that record and put it in the record, not for the jury.

Note: Here followed recess for lunch.

Mr. Ellis: If Your Honor please, I object to the cross examination of the witness and except to the action of the Court in permitting him to be cross examined for the reason that I submit that when the Court has once ruled that the evidence that the witness would testify to in chief is inadmissible in the case, then it would be improper to permit him to be cross examined about a matter which the Court has already ruled out of the case.

Mr. Simpkins: If Your Honor please, counsel for the Commonwealth desires to state that he thinks that all of the evidence of what happened before the Board of Supervisors is irrelevant and immaterial and is not proper evidence un-

C. W. Taylor.

der the statute which we have discussed; but for page 116 } the purpose of the record, if the evidence is allowed in as to what action the Board of Supervisors took, in order that the matter to be taken up may be a true picture of the entire action by the Board of Supervisors, we think you ought to let us have the customary cross examination of Mr. Taylor.

The Court: I am going to permit you to do it for the reason that, while the evidence is in my opinion inadmissible, I do not think that any part of it ought to be permitted to go up unless the whole of it goes up, and for that reason I will let you cross examine him and develop the whole transaction.

Note: Here followed argument.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. Mr. Taylor, as Clerk of the Board of Supervisors on the occasion about which you have just been examined, at which time a motion was made regarding the beer ban, was it your duty to receive petitions from citizens of the County with reference to the beer ban, and did you observe the discussion that took place and the delegation which appeared before them for and against the banning of beer on Sunday?

A. Yes.

Q. Do you have the petitions that came to the page 117 } Board asking that beer on Sunday be banned?

A. I have.

Q. About how many of those petitions do you have?

A. I have all that were filed. You want to know the number that were filed?

Q. Approximately, yes, sir, the number.

By the Court:

Q. How many were filed?

A. I have them here. I think there were about ten. Nine or ten.

Q. Nine or ten? Are those petitions all in favor of the ban, or were some of them asking that the ban on Sunday beer not be placed?

A. There were no written petitions requesting that it be not banned.

C. W. Taylor.

Q. All the petitions, then, were in favor of the Sunday beer ban?

A. Yes, sir.

By Mr. Simpkins:

Q. Do you know about how many people appeared before the Board on the date that this action, which you have testified to in response to Mr. Ellis's questions, took place?

A. I would say there were at least fifty, and there might have been as many as 75 people present.

Q. Did people speak on both sides of the issue, both for the ban and against the ban?

page 118 } A. Yes.
Q. Could you from your observation form a conclusion as to how the opinion of those present was? Was it about evenly divided, or otherwise?

A. Among those present, I would say that it is possible that there were more opposing the ban than were in favor of it, but, as you know, the written petitions were filed. That would affect it, probably, anything of that sort.

Q. Yes. Most of the people that spoke in favor of the ban, I believe, were ministers representing church congregations?

A. I think so, yes. They certainly predominated.

Q. And most of the people that spoke against the ban were licensees?

Mr. Haw: Are you examining the witness, or—?

The Court: He can lead him on cross examination.

Mr. Simpkins: He is not on direct examination.

The Court: No, you put him on.

By the Court:

Q. Who were the people that you have stated? You have stated about the people that spoke in favor of the ban. Who were the people who appeared or spoke against the beer ban on Sunday, not by name, but by classification?

A. I would say the greater number of them were beer dealers. A. B. C. licensees.

page 119 } Q. Do you know how many names were signed to those petitions?

A. No, sir.

Q. Can you approximate the number?

A. About one thousand.

EXHIBIT C

EXHIBIT C

Sumter Priddy.

Mr. Haw: Out of twenty-five thousand.

The Court: All right. Now, I am going to strike it all out. I am not going to permit any of it to come in, and I will tell the jury to disregard your question.

Note: Jury returns to the courtroom.

The Court: Gentlemen of the jury, when Mr. Taylor was under cross examination Mr. Simpkins, the Commonwealth's Attorney, asked him something about certain petitions having been filed with the Board of Supervisors. You will disregard that evidence, and you will disregard all the remarks made about the Board of Supervisors. Their action or failure to act has nothing to do with this case, and you will not regard anything that has been said about the Board of Supervisors in the matter.

Mr. Haw: We except to the Court's ruling and instructions to the jury in that regard, for the reasons already assigned in our objections as heretofore recorded.

The Court: Do you want to except to my striking out your cross examination?

Mr. Simpkins: No, sir, I don't want to except.

page 120 } The Court: All right. I will let everybody except if they want to.

Note: Mr. C. W. Taylor stood aside.

SUMTER PRIDDY.

a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Ellis:

Q. You are Mr. Sumter Priddy, and you are now and were in the month of September last Sheriff of Hanover County?

A. Yes, sir.

Q. Did you have occasion to be in Mr. Francisco's store or filling station on Sunday, September 7th, 1941?

A. I don't remember the exact date, but I was there on quite a number of Sundays.

Q. Do you recall seeing Mr. Cauthorne or Mr. Williams come in and purchase a bottle of beer on any Sunday that you were there?

A. Yes, sir.

Sumter Priddy.

Q. How long were you there on the Sunday that they made the purchase of beer?

A. I had been there twice that afternoon. In fact, I didn't stop, I slowed up and went by, went up the road and came back and I stayed there about an hour.

page 121 } Q. In what manner was the place of business being conducted with respect to orderliness or behavior?

A. It was quiet. I didn't see anything wrong.

Q. Did he make any sales of beer or wine to others while you were there?

A. I bought two Coca-Colas from him and a box of ice cream.

Q. On other occasions when you were there on Sundays, had you seen him make any sales of wine or beer?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Simpkins:

Q. How did you happen to be visiting Mr. Francisco on two occasions on that Sunday?

A. I went by, went in Louisa County, just over the line, to see a party, and when I came back I stopped by Mr. Francisco's.

Q. You stopped on the way up?

A. I didn't stop on the way up.

Q. You said you visited him on two occasions?

A. I said I slowed up when I went by; I didn't stop.

Q. You didn't stop, but you stopped when you came back?

A. I stopped when I came back.

Q. You just stopped in there as you would stop in any other place?

A. Yes, sir.

page 122 } Q. Didn't stop for any purpose other than to buy the Coca-Cola?

A. Well, I was riding around, driving through the County. I stop any time at any place to see if everything is quiet, and no drunks riding around.

Q. Then you did stop under your duties as Sheriff to see if everything was orderly?

A. Well, I do most everywhere I go along, in line of duty.

Q. Had you had any request by anyone to stop there?

A. No, sir.

EXHIBIT

C

EXHIBIT

C

Sumter Priddy.

PAGE 91

Q. Or to observe that place for orderliness or disorderliness on Sundays?

A. No, sir.

Q. Had none at all from anyone?

A. No, sir.

Witness stood aside.

Mr. Simpkins: That is all, if Your Honor please.

Note: At this point the Court took up consideration of instructions.

page 123 } Note: Here followed extended argument on instructions.

Mr. Ellis: Counsel for the defendant excepts to the action of the Court in refusing to give Instructions Nos. 2, 3, 4, 5, 6, 7 and 8 offered by him, for the reason that the question of whether or not the sale of beer on Sunday under the particular circumstances mentioned in this case is a question of fact for the jury, and that the giving of the instructions is authorized under the decisions of the Court, the Supreme Court of Appeals, in the cases of *Pirkey v. Commonwealth* and *Lakeside Inn v. Commonwealth*, both reported in 134 Virginia.

Now, here are 11 and 11 (a) we are going to ask for.

You refuse them, do you, Judge?

The Court: Yes, sir.

Mr. Haw: Counsel for the defendant excepts to the action of the Court in refusing Instructions 11 and 11 (a) as offered on behalf of the defendant for the reason that it is proper that the jury be permitted to pass upon the question as to whether or not the sale of beer on Sunday by the defendant, under the circumstances and conditions as shown by the evidence, in the County of Hanover, was lawful, due to the fact that the Act of Assembly of 1934 under which the Alcoholic Beverage Control Board was created permitted the issuance to retailers of the State of Virginia of licenses for the sale of beer and wine without any restriction whatsoever as to the sale of the same under State licensing on Sunday.

Note: Here followed argument.

Note: The jury returned to the Courtroom.

The Court: Gentlemen of the jury, the accused in this case is presumed to be innocent until his guilt is established by one reasonable doubt, and the burden of proof rests upon the Commonwealth to prove that this gentleman sold beer on Sunday. Now, if you believe from the evidence beyond reasonable doubt that he did sell beer on Sunday, then I give you this instruction:

Note: At this point the Court read to the jury Instruction No. 1.

Note: Following a discussion with counsel, the Court addressed the jury as follows:

The Court: That is what the instruction tells you gentlemen, that the only question involved is, do you believe from the evidence beyond a reasonable doubt that Mr. Francisco sold beer on Sunday? Now, if you believe from the evidence beyond a reasonable doubt that he sold beer on Sunday, then you must find him guilty, and five dollars will be a sufficient fine to be fixed.

Mr. Haw: Of course it is understood that the written instruction, No. 1, as well as the verbal instruction given to the jury by the Court are objected to by counsel page 125 } for the defendant and excepted to. The action of the Court in giving them is excepted to for the reasons heretofore stated.

The Court: Yes.

Mr. Haw: We also except, Your Honor, to the remarks of the Commonwealth's Attorney which were not made as argument, but in instructing the Court what the Court should do, and which were prejudicial to the defendant's case, in that it amounted to an extra instruction given by the Commonwealth's Attorney.

The Court: Well, when the instruction is given by the Court, it could not prejudice the defendant's case, because the Court has instructed the jury.

Note: At this point the jury retire to consider of their verdict.

Note: The remarks of the Commonwealth's Attorney referred to above by Mr. Haw were as follows:

Mr. Simpkins: Can you tell them that the maximum fine for misdemeanor is \$500.00?

The Court: Yes, the maximum fine for misdemeanor is \$500.00, but \$5.00 will be a sufficient fine to fix in this case.

Mr. Simpkins: Do you want to say anything page 126 } to the jury?

Mr. Haw: We don't care to argue it, gentlemen.

Mr. Simpkins: I would like to make a statement to the jury.

Mr. Haw: I don't think it is necessary to have any argument in the case.

Mr. Simpkins: There is one thing—

Mr. Haw: If you want to make a statement, we will argue it.

Mr. Simpkins: Well, I will use five minutes—

The Court: I cannot prevent you gentlemen from arguing the case if you want to, but I do not see the necessity of argument. I have instructed the jury that, if they believe from the evidence beyond a reasonable doubt that Mr. Francisco sold beer on Sunday, that they must find him guilty.

Mr. Simpkins: In other words—Wait a minute, now—

Mr. Haw: You can't tell me when to sit down and stand up.

Mr. Simpkins: All I want, if Your Honor please—

Mr. Haw: Are you going to address your remarks to the Court or the jury?

Mr. Simpkins: I will address them to the Court, and if the Court does as I ask, I want to make a statement to the jury. If Your Honor please, I merely want to page 127 } discuss the instruction, so if you will state to the jury that it leaves out of the case the question which they have heard us talking about here all day, whether it was a necessity or not, and that the Court has ruled it is not a necessity, and if they believe he sold it, then he is guilty.

Note: After staying out five minutes the jury knocks.

The Clerk: Have you agreed upon a verdict, gentlemen?

The Foreman: Yes, sir.

The Clerk: "We, the jury, find the accused guilty as charged in the within indictment and fix his punishment at a fine of \$5.00. Signed, James Jones, Jr., Foreman." Is that your verdict, gentlemen?

The Foreman: Yes, sir.

The Court: Now, gentlemen, you are discharged until Wednesday, October 29th.

EXHIBIT

C

EXHIBIT

C

Note: Jury leaves the courtroom.

Mr. Ellis: If Your Honor please, on behalf of the defendant we move to set aside the verdict of the jury as being contrary to the law and the evidence, and for misdirection of the jury by the Court.

page 128 } The Court: All right, sir, and we will continue that motion and I will hear you on it.

Mr. Ellis: You want to hear argument on it?
The Court: Yes, sir.

Note: The following instructions were offered: No. 1 on behalf of the Commonwealth, and Nos. 2, 3, 4, 5, 6, 7, 8, 11 and 11-A on behalf of the accused. Instruction No. 1 was granted, all the others refused.

INSTRUCTION NO. 1.

The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the accused M. G. Francisco did keep open and maintain on Sunday the 7th of September in Hanover County a business for the sale of beer and did on said Sunday sell beer, they should find him guilty and fix his punishment at a fine of not less than five dollars.

(Given.)

INSTRUCTION NO. 2.

The Court instructs the jury that the purpose of the law in prohibiting work from being done on Sunday is to give to the public a rest from its customary labor for the benefit of both the moral and physical nature of mankind, and not for the purpose of enforcing the beliefs or tenets of any religious creed or denomination.

(Refused.)

INSTRUCTION NO. 3.

The Court instructs the jury that the burden of proof is on the Commonwealth to establish beyond a reasonable doubt that the defendant in the operation of his business sold on Sunday beer as alleged to have been sold in the indictment, and that the labor and business in so doing were not a work of necessity or charity, and unless the Commonwealth has met this burden, they should find the defendant not guilty.

(Refused.)

EXHIBIT
C

EXHIBIT
C

INSTRUCTION NO. 4.

The Court instructs the jury that if they find from the evidence that the keeping open by the defendant of his place of business on Sunday and the sale therein of the beer as alleged in the indictment tended to promote the reasonable recreation, and necessary convenience of the travelling public, and that the premises where said business was transacted were kept in an orderly and quiet manner and that the work therein done was morally fit and proper to be done on Sunday, then they may find that the work of conducting such filling station for the purposes outlined, is necessary within the meaning of the statute and they should find the defendant not guilty.

(Refused.)

INSTRUCTION NO. 5.

The Court instructs the jury that a work of necessity as meant by the Statute of Virginia, is not a physical and absolute necessity, but a moral fitness or propriety of the work or labor or act done under the circumstances of each particular case.

(Refused.)

INSTRUCTION NO. 6.

The Court instructs the jury that the question of whether the act of keeping the defendant's place of business open and selling beer on Sunday was a work of necessity within the meaning of the Statute, is a question of fact for the jury, and in deciding that question the jury may consider the manner in which the premises and the business connected therewith were run, the effect which the opening of the place and the sale of beer therefrom has on the good order and moral welfare of the community, and whether or not it tends to the orderly and moral recreation of the public.

(Refused.)

INSTRUCTION NO. 7.

The Court instructs the jury that if they find from the evidence that the opening of the defendant's place of business and the sale therefrom of beer on Sunday, is a public

necessity within the meaning of the Statute, then the defendant should be found not guilty.

(Refused.)

INSTRUCTION NO. 8.

The Court instructs the jury that there is no fixed or unvarying definition of the word "necessity", but on the other hand, it is an elastic and relative word and one that must be construed in the light of the conditions under which we live at the present, and not in the light of the past, for many things that were considered luxuries then, or even had no existence at all, are now considered necessities.

(Refused.)

INSTRUCTION NO. 11.

The Court instructs the jury that by an act page 132 } of the General Assembly of Virginia passed at the 1934 Session there was created the Alcoholic Beverage Control Board with power to issue to retailers in the State of Virginia licenses for the sale of beer and wine and pursuant thereto said Board has proceeded to issue to the retailers in Virginia, including the defendant, such licenses without any restriction therein as to sales on Sunday; further that by a further act of the General Assembly passed in 1938 the Board of Supervisors of the several Counties in Virginia were empowered to pass ordinances to prohibit the sale of wine and beer on Sunday, which act provided that nothing therein should be construed as altering, amending or repealing Section 4570 of the Code (commonly known as the Sunday blue law).

Further the Court tells the jury that it appears from the evidence that since the passage of the Act of 1938 application has been made to the Board of Supervisors of Hanover County to pass an ordinance prohibiting the sale of beer and wine in Hanover County on Sunday, but regardless of its power to do so the Board of Supervisors refused to pass such ordinance and that there is in existence in Hanover County no ordinance of said Board which prohibits the sale of beer and wine on Sundays.

(Refused.)

page 133 } INSTRUCTION NO. 11-A.

The Court instructs the jury that under the laws of Virginia since the year 1938 the Board of Supervisors of Han-

EXHIBIT

EXHIBIT

C

over County has had the authority to adopt an ordinance (effective outside of the Town of Ashland) specifically making it unlawful to sell beer and wine in the County, although the statute conferring that power upon the Board of Supervisors further provides that nothing therein contained, nor any ordinance adopted by the Board of Supervisors in pursuance thereof, shall be construed as in any way changing or repealing the law generally known as the "Sunday" law, under which this prosecution is had.

(Refused.)

page 134 } I, Leon M. Bazile, Judge of the Circuit Court of Hanover County, Virginia, do certify that the foregoing, which is embraced within the covers of this volume, entitled, "Virginia, in the Circuit Court of Hanover County, Commonwealth of Virginia v. M. G. Francisco, October 17, 1941" including pages from 1 to 108 (both inclusive) and which is further identified by the signature of the Judge of this court on the front cover thereof, is a true and correct stenographic copy and report of all the testimony and evidence on behalf of the Commonwealth, and also on behalf of the defendant as therein denoted, that was introduced, and the other incidents of the trial, including all of the instructions requested, given, and refused and objections and exceptions thereto, as therein indicated, as well as all questions raised, rulings thereon and exceptions thereto in the trial of the above-styled case, and that the Attorney for the Commonwealth has had reasonable notice of the time and place when this report and certificate would be tendered and presented to me for my signature, all of which is certified within sixty days after final judgment.

Given under my hand on this 5th day of May, 1942.

LEON M. BAZILE,
Judge of the Circuit Court of the
County of Hanover, Virginia.

page 135 } Mr. E. P. Simpkins
Attorney for the Commonwealth for Hanover
County, Virginia.

Dear Mr. Simpkins:

This is to notify you that we will on the 6th day of May 1942, apply to the Clerk of the Circuit Court of Hanover County for a transcript of the record in the case of Commonwealth v. M. G. Francisco for the purposes of making an ap-

plication to the Supreme Court of Appeals of Virginia for a writ of error.

Yours very truly,

GEO. E. HAW.
ANDREW J. ELLIS.
Attys. for M. G. Francisco.

Legal and timely service of the above notice is hereby accepted on this 5th day of May, 1942.

EDWARD P. SIMPKINS, JR.,
Attorney for the Commonwealth of
Hanover County, Virginia.

page 136 } State of Virginia,
County of Hanover, To-wit:

I, C. W. Taylor, Clerk of the Circuit Court for the County of Hanover do hereby certify that the foregoing is a true copy of the record in the action of The Commonwealth of Virginia v. M. G. Francisco, and I further certify that due notice of intention to apply for such transcript was given by Counsel for the Defendant to the Attorney for the Commonwealth.

Given under my hand this 25th day of May, 1941.

C. W. TAYLOR,
Clerk of the Circuit Court of
Hanover County.

Clerk's Fee \$10.00.

A Copy—Teste:

M. B. WATTS, C. C.

EXHIBIT
C

EXHIBIT
C

INDEX TO RECORD

	Page
Petition for Writ of Error	1
Record	19
Indictment for a Misdemeanor	19
Verdict and Motion to Set Aside.....	21, 93
Judgment—March 16, 1942,—Complained of.....	21
Opinion of the Court	22
Transcript of Testimony, etc.	35
William J. Nichols	35
Charlie Williams	42
Conway Cauthorne	46
I. O. Keeton	52
M. G. Francisco	60, 69, 79
Mrs. M. G. Francisco	67
R. K. Turner	71
Mrs. Mary R. Winn	72
Robert Stone	76
F. R. Baker	80
Frank Bradley	82
C. W. Taylor	85
Sumter Priddy	89
Argument and Exceptions to Instructions	91
Remarks of Commonwealth's Attorney Excepted to....	92
Instructions	64
Judge's Certificate	97
Notice of Application for Transcript of Record.....	97
Clerk's Certificate	98

Cover Sheet for

Exhibit “D”

Commonwealth’s Brief on Appeal

For Virginia Supreme Court Closing Law Appeal

in *Francisco v. Commonwealth*, 180 Va. 371 (1942)

Hanover County, Virginia (1942)

First Page of Discussion of the Exhibit in Thesis Text:

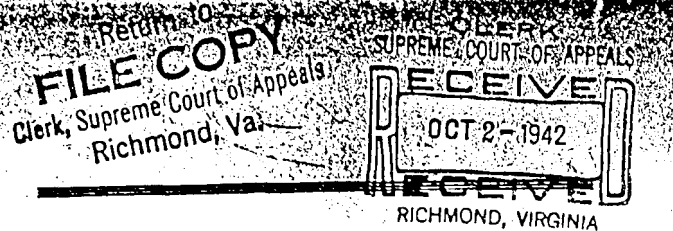
Page 135, footnote 4

EXHIBIT

D

EXHIBIT

D



In the
Supreme Court of Appeals of Virginia

—
TERM 1942-1943
—

—
RECORD No. 2633
—

M. G. FRANCISCO

vs.

COMMONWEALTH OF VIRGINIA

—
BRIEF ON BEHALF OF THE COMMONWEALTH
—

ABRAM P. STAPLES,
Attorney General.

EDWIN B. JONES,
Assistant Attorney General.

EXHIBIT
D

SUBJECT INDEX

PAGE

The Facts	1
The Question to Be Decided	2
Argument	2
Conclusion	8

TABLE OF CITATIONS

CASES

Callan v. State, 156 Md. 459, 144A., 350 (1929)	3
Capital Theater Co. v. Commonwealth, 178 Ky. 780, 789	2
Commonwealth v. Moriarty (Mass.) 40 N.E. (2d) 307 (1942)	7
Ellis v. Covington, 122 Va. 821	2
Hanger v. Commonwealth, 107 Va. 872	2
Natural Gas Products Co. v. Thurman, 205 Ky. 100, 265 S.W. 475	7
People v. Waldman, 261 App. Div. 1001, 26 N.Y.S. (2d) 707....	8
Pirkey Brothers v. Commonwealth, 134 Va. 713, 722.....	4, 5, 6
State v. Schatt, 128 Mo. App. 622, 107 S.W. 10.....	7
State v. Wertz, 114 S.E. 242, 91 W. Va. 622, 29 A.L.R. 391.....	5
Taylor v. Commonwealth, 90 Va. 109	4

EXHIBIT
D

MISCELLANEOUS AUTHORITIES

20 C. J. 1070, Sec. 39-j	4
60 C. J. 1096	5
General Laws (Ter. Ed.) Chapter 136, Sec. 5.....	8

EXHIBIT
D

In the
Supreme Court of Appeals of Virginia

TERM 1942-1943

RECORD No. 2633

M. G. FRANCISCO

vs.

COMMONWEALTH OF VIRGINIA

BRIEF ON BEHALF OF THE COMMONWEALTH

THE FACTS

This case presents to the Supreme Court of Appeals for decision whether or not the business of selling beer in the Commonwealth is a "trade or calling" whose

EXHIBIT
D

prosecution on Sunday is prohibited by section 4570 of the Code of 1936. It comes before this court on an appeal from a judgment of the Circuit Court of Hanover County. M. G. Francisco was convicted by a jury on October 17, 1941, and judgment was rendered on March 16, 1942. A fine of \$5 was assessed.

The facts are correctly stated, and the law clearly and forcefully expressed in the opinion of the learned trial judge included in the record, which is adopted in toto as a part of this brief by reference, and is not reprinted here.

THE QUESTION TO BE DECIDED

The final decision in this case will determine the policy with respect to the sale of beer on Sunday throughout the Commonwealth until a different policy may be declared by the General Assembly. The courts construe and interpret the law. *Capital Theater Co. v. Commonwealth*, 178 Ky. 780, 789. Section 4570 of the Code prohibits the laboring at any trade or calling on Sunday, except works of necessity or charity, and certain specific exceptions which do not include the sale of beer. Chapter 129 of Acts of Assembly of 1942 by special proviso in the Act does not alter the provision of section 4570.

ARGUMENT

Counsel for defendant (P. 9) take the position that the decision in *Ellis v. Covington*, 122 Va. 821, and *Hanger v. Commonwealth*, 107 Va. 872, are not to be considered as law because the principle established in

them, prohibiting the sale of soft drinks on Sunday, is being violated. They introduced evidence in the instant case that at least 80 per cent of the holders of licenses for the sale of wine and beer in Hanover County were selling either wine or beer or both on Sunday. This kind of argument and procedure might be very well for jury consumption, if permitted, but, of course, will have no influence here.

In *Gallan v. State*, 156 Md. 459, 144 A. 350, 353 (1929) the defendant was being prosecuted for opening an opera house on Sunday. The particular portion of the opinion with which we are concerned is as follows:

"There are seventeen exceptions to the rulings of the court upon the evidence, and as to these appellants contend:

"First, that the court erred in not allowing them to show that the construction placed upon the law by those charged with its enforcement was such as to permit without molestation in Baltimore city on Sunday morning picture shows in churches, operas in the Lyric Theater, and basket ball games in public places, for which either admission was directly charged or at which a collection was taken up. We find no error in these rulings. The guilt or innocence of the traversers here could not be made to depend upon the question of whether other parties had been guilty of similar acts without prosecution or conviction, any more than the fact that persons engaged in similar occupations had been convicted would be proper evidence for the jury to consider

in order to convict the traversers here. Neither can a criminal statute be repealed by the failure of authorities to prosecute and convict for its violation. Ninety-nine grand juries might refuse to indict for the violation of a statute and the hundredth might take the opposite view and indict. It would clearly be not admissible in the trial of the case to allow evidence of the failure of the ninety-nine juries to indict."

Cf. *Taylor v. Commonwealth*, 90 Va. 109.

The court's province is to interpret the law, and to see to it that it is enforced. Wholesale violation of a statute does not render it void or negative its force. And evidence of other violations by the accused is improper and should not be admitted against him, nor should evidence of violations by other persons be admitted in his behalf.

"The mere fact that a license has been granted to do certain acts or carry on a certain business does not exempt one holding such license from the necessity of complying with Sunday laws, where the acts or business in question are of such nature as to fall within the prohibitions of such laws; and this is true even where the license is one granted by the United States." 60 C. J. 1070, section 39-j and cases cited.

This court has declared that there are cases in which what is a "necessity" is a question for the court to decide as a matter of law (*Pirkey Brothers v. Commonwealth*, 134 Va. 713, 722). The learned trial judge has rightly

EXHIBIT
D

.....

EXHIBIT
D

.....

held that this is such a case. Considering the character of the product sold, the fact that the purchase could have been made on any day during the week, that beer is definitely a luxury and not a necessity under any circumstances, that the demand for sale of beer on Sunday comes from holders of licenses for the sale of beer and wine, and that tourists, rather than residents in the community, demand and are being given the service, and that beer is *simply desirable*, he has wisely held that there is no necessity as a moral fitness or propriety of the work and labor done under the circumstances of the case.

"* * * The word (necessity) is elastic and relative, and must be construed with reference to the conditions under which we live, *and yet the elasticity must not be extended so far as to cover that which is not needful but simply desirable, and thereby defeat the manifest purpose of the statute to set apart Sunday as a day of rest from ordinary labor.*" (Italics supplied.) *Pirkey Brothers, supra*.

"Whether work done on the Sabbath is a work of necessity or charity may be a question of law to be decided by the trial court, in cases *where the facts are established or agreed upon.* *Capital Theater Co. v. Commonwealth*, 199 S. W. 1076, 178 Ky. 780." (Italics supplied) 60 C. J. 1096, note.

We have not had our attention called to a case in which the sale of beer on Sunday has been held to be a work of necessity.

In *State v. Wertz*, 114 S. E. 242, 91 W. Va. 622, 29 A. L. R. 391, it is said:

"It cannot be said, as matter of law, that selling soft drinks and conducting a soft drink stand is either a work of necessity or charity."

The annotation (29 A. L. R. p. 407) deals with ordinances dealing with Sunday closing of places selling intoxicating liquors. The decisions cited have uniformly upheld the ordinance in every case where the ordinance was made in conformity with the law authorizing its adoption.

The only persons who appear in behalf of the defendant, and, of course, in favor of Sunday sale of beer, are those who hold licenses to sell beer. His witnesses, Keeton, Mrs. Winn, Stone, Baker and Bradley are all licensees, and Bradley has four places where wine and beer are sold, and all these sell beer on Sunday. Are these proper persons to reflect a community "opinion of moral fitness and propriety" of the work or labor done? They belong to the articulate class. The real community opinion is made by those substantial citizens who rely upon and respect the courts and support them.

The customers of these witnesses would like for them to sell whiskey also. And the witnesses doubtless would be glad to have the privilege of doing so.

This court has declared that there are cases where the question is one of law for the court (*Pirkey Brothers case*, p. 725). The learned trial judge has rightly held that this is such a case. Considering the character of the product sold, that the purchase could have been made during the week, that beer is definitely a luxury

and not a necessity under any circumstances, that the demand is being made by beer licensees, and that "tourists" demand and are being given the service, he has wisely held that there is no necessity as a moral fitness or propriety of the work and labor done under the circumstances of this case. Some courts hold that where the nature of the act or work is patent and obvious as constituting a work of necessity, or the contrary, the question becomes one of law for the court. An example is found in the case where one was convicted of working in a barber shop generally on Sunday. *State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10.

Where it was shown that serious loss would be entailed from closing a plant in which "carbon black" was manufactured from natural gas, the court decided that there was a necessity and that operation on Sunday would not be a violation of the Sunday law. It was shown clearly by the evidence that it took two or three days after the Sunday shutdown for the machinery to run normally and to produce a product that was of good enough quality to be used generally in the processes for which it was intended. *Natural Gas Products Co. v. Thurman*, 205 Ky. 100, 265 S. W. 475.

In the recent case of *Commonwealth v. Moriarty*, (Mass.) 40 N. E. (2d) 307, 308 (1942), defendant was convicted for keeping a "shop" open on Columbus Day and selling intoxicating liquor.

General Laws (Ter. Ed.) Chapter 136, Section 5, which is referred to as the Lord's day statute, provides that "Whoever on this Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor,

business or work, except works of necessity and charity, shall be punished by a fine * * *." This statute was amended to apply to Columbus day. Defendant was convicted and the judgment was affirmed.

In the case of *People v. Waldman*, 261 App. Div. 1001, 26 N. Y. S. (2d) 707, defendant was convicted of selling beer on Sunday. The court said:

"* * * so far as the conceded act of the defendant in selling beer on Sunday is concerned, the same constituted a violation of the Penal Law, section 2147, which statute was not amended or repealed by the provisions of the Alcoholic Beverage Control Law so far as it (sec. 2147) contemplates and, in effect, prohibits the defendant's act. * * *"

CONCLUSION

The record is devoid of reversible error and the judgment should be affirmed.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General.

EDWIN B. JONES,
Assistant Attorney General.

EXHIBIT
D

EXHIBIT
D

Cover Sheet for

Exhibit “E”

Appointment of Joseph Z. Johnson as Hanover County Supervisor

by Judge Leon Bazile on December 30, 1941

Hanover County Common Law Order Book No. 19, Page 214

Hanover County, Virginia (1941)

First Page of Discussion of the Exhibit in Thesis Text:

Page 177, footnote 3

December 17th. 1941.

Garland Grubbs, an infant, etc.

Vs. Upon an appeal from the judgment of the Trial Justice Court.

Leroy King.

This day came the parties in person, and by their Attorneys, and the defendant having plead not guilty, puts himself on the Country and the plaintiff doth the like, thereupon came a jury, to-wit: W. S. Harris, Jake Hale, A. B. Tate, Wilbur Lee Stanley, and Hartwell Adams, who being sworn the truth upon the premises to speak, having fully heard the evidence, being instructed by the Court and having heard argument of counsel retired to their room and after sometime returned into court and returned the following verdict, to-wit: "We the jury find for the defendant." Signed, W. S. Harris, Foreman.

And the jury being discharged it is the judgment of the Court that the plaintiff take nothing and that the defendant recover of the plaintiff its costs by him in this cause in his behalf expended.

Leon M. Bazile, Judge

EXHIBIT

E

VIRGINIA: In the Circuit Court for the County of Hanover, held at the Court House thereof on the 20th day of December, in the year of our Lord Nineteen Hundred and Forty-one.
Present: Hon. Leon M. Bazile, Judge.

In re the vacancy in the
Office of Supervisor from
Beaver Dam District.

It appearing to the Court that T. M. Thompson, the member of the Board of Supervisors of Hanover County from Beaver Dam District, has departed this life, thereby creating a vacancy in said office, IT IS ORDERED, that J. Z. Johnson, a qualified voter resident of Beaver Dam District, Hanover County, be and he is hereby appointed Supervisor from said District to fill the unexpired term of such office.

EXHIBIT

E

In re the appointment of
Martha Conway as a Commissioner in Chancery
for this Court.

The Court deeming it necessary for the convenient dispatch of the business of this Court, IT IS ORDERED that Martha Conway, a member of the bar of this Court, be and she is hereby appointed a Commissioner in Chancery of this Court.

Leon M. Bazile, Judge

Cover Sheet for

Exhibit “F”

Draft Letter from Judge Leon Bazile on November 20, 1941

To the United States Attorney General

Demanding Labor Leader John L. Lewis be Tried for Treason

(Courtesy of the Virginia Historical Society, Richmond)

First Page of Discussion of the Exhibit in Thesis Text:

Page 141, footnote 18

(Note: Typescript Copy of Exhibit “F” prepared by William R. VanderKloot
and attached following Exhibit “F” as Exhibit “F-1.”)

Elmwood, Va

Nov 20, 1941

EXHIBIT -

F

Dear Mr. Attorney General

I write to urge you to start proceedings for the indictment and trial of John G. Lewis on the charge of treason.

The United States are at war with Germany. How v Tingy 4 Wall. 37, 40, 1 C ed. 731, 733-4
"Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." Constitution III, 3, 1.

Mr. Lewis is adhering to the cause, the Nazis, giving them aid and comfort. What he is doing has but one dominant purpose in view, namely the injury of our war efforts and the promotion of the cause of our enemy. This is treason. Young v The United States, 97 U.S. 39, 61-66, 24 L ed. 992, 998-99

I was a member of the A.E.F. in 1918-1919. I was in France in the autumn of 1938, and I saw French later than living to France what Mr. Lewis is now trying to do to the United States. We know how disastrous was what later did to France. Surely the responsible authorities of the United States are not going to wait until we are brought to the brink of ruin before attempting to do something about it.

I urge you to act with the assurance of my esteem I am

was never was sure to the Attorney General of the United States by U.S. Mail, but he did not publish the country to acknowledge it. Rem in a file.

EXHIBIT - F

Exhibit "F"-1

Typewritten Facsimile of Handwritten File Copy of Leon M. Bazile Letter
From the Virginia Historical Society prepared by Wm. R. VanderKloot, June 15, 2005

Elmont, Va
Nov[?] 20, 1941

Dear Mr. Attorney General

I write to urge you to start proceedings for the indictment and trial of John L. Lewis on a charge of treason.

The United States are at war with Germany. Bas v Tingy, [4 US] 4 Dall. 37, 40, 1 L. ed.731, 733-4 [(1800)].

"Treason against the United States shall consist only in levying war against them or in ad-hering to their enemies, giving them aid and comfort." Constitution III, 3, 1.

Mr. Lewis is adhering to the cause of the Nazis, giving them aid and comfort. What he is doing has but one dominant purpose in view, namely the injury of our war efforts and the promotion of the cause of our enemy. This is treason. Young v The United States, 97 US. 39, 61-66, 24 L ed. 992, 998-99 [(1877)].

I was a member of the A.E.F in 1918-1919. I was in France in the autumn of 1938, and I saw French labor then doing to the Franch [sic] what Mr. Lewis is now trying to do to the United States. We know how disastrous was what labor did to France. Surely the responsible authorities of the United States are not going to wait until we are brought to the brink of ruin before attempting to do something about it.

I urge you to act.

With the assurance of my esteem[,] I am

Respectfully,

[In the left margin in a "North-South" direction is written:] "This letter was sent to the Attorney General of the United States by U.S. Mail, but he did not have the courtesy to acknowledge it. Leon M. Bazile."

Exhibit "F-1"

Cover Sheet for

Exhibit “G”

Letter from House of Delegates Member Albert O. Boschen on December 28, 1941

To the Honorable Leon M. Bazile

[Last sentence in third paragraph from end of letter concerning “Geo Haw
and Andrew Ellis” is significant for this thesis.]

(Courtesy of the Virginia Historical Society, Richmond)

First Page of Discussion of the Exhibit in Thesis Text:

Page 143, footnote 22



COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

COMMITTEE ASSIGNMENTS
APPROPRIATIONS
CLAIMS
ASYLUMS AND PRISONS
EXPOLLED BILLS

ALBERT O. BOSCHEN
RICHMOND CITY
RICHMOND, VA.

SUNDAY

December 28th, 1941

EXHIBIT

6

Hon. Leon M. Bazile,
Elmont, Virginia,

My Dear Leon:

I am now addressing you as a friend, and not as Judge. Please pardon the familiarity, for I have known you that length that I shall take the liberty to address you as I have in this letter.

I thank you for from the bottom of my heart for your kind letter, in which you wished me a "Very Happy Christmas and New Year".

I extend to you with all my heart the very wishes for a Happy New Year, and the best of health, (shall I say, Wealth), and a long and successful career as Judge.

I talked with the Governor the other day relative to reducing speed on the automobiles and told him of the effort on my part to get a joint resolution through to have the Congress of the United States pass an act to stop the manufacture of automobiles that could run more than 45 miles an hour.

I was laughed at, and the resolution sleeps silently in the tomb where many a good measure sleeps on, because of selfishness on the part of this or that interest.

Now, we see a CLAMOR to stop cars from running more than 35 miles an hour.

The cause or the reason is a proper one I should think that the lives of our good people was a proper reason to stop cars from racing to eternity, but I have at last reached the point that the public does not want a "Don Quixote", nor do they need either "Atlas" to carry the world on his shoulder or "Hercules".

While talking to the Governor, your name came up and I told him that he did one big act when he appointed you as Judge. He told me that he had splendid reports of your good work. I did not know that Geo. Haw and Andrew Ellis opposed you but I understand it now.

I am glad you are going to take time out and watch me, for I know that I must have done something in the past to evoke from you that kind expression.

May God Bless you and keep you, so that the people of this State can have the benefit of your ability. With best personal regards, I am,

Sincerely Your Friend,

Albert O. Bosch

EXHIBIT

6

Cover Sheet for

Exhibit “H”

Letter from Thesis Writer William R. VanderKloot on April 16, 2002

To Mr. Sumpter Priddy

Concerning his father, 1941 Hanover County Sheriff Sumpter Priddy

First Page of Discussion of the Exhibit in Thesis Text:

Page 144, footnote 24


WILLIAM R. VANDERKLOOT
11801 GOODWICK SQUARE
RICHMOND, VIRGINIA 23233-3424
(804-754-2775); e-mail: vanderklu@aol.com

April 16, 2002

Hand delivered

EXHIBIT

H


Mr. Sumpter Priddy
15262 Ocean Road
Montpelier, Virginia

Re: Information about *Francisco v. Commonwealth*, 180 Va. 371 (December 7, 1942)

Dear Mr. Priddy:

You were kind enough to advise me of some particulars about this case, tried in Hanover County, Virginia beginning October 17, 1941, when you were a young man and your father, also named Sumpter Priddy, was the county sheriff.

You advised that your father had told you, in so many words, that this case was brought in no small measure because a County Commissioner, Joseph Johnson, from the Beaverdam area of the County, had a daughter who operated a store similar to the one allegedly operated illegally by Mr. Francisco on a Sunday. The inference was, as your father understood it and suggested to you, in so many words, was that Johnson hoped thereby that his daughter could gain a commercial advantage over Francisco, due to the latter's having been prosecuted in this case for operating his business on Sunday in violation of the Sunday Closing Law in force in Virginia at that time.

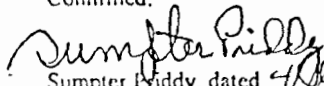
You, of course, had no direct involvement in the case, and no access to records or major personalities involved in that long-ago criminal case, where the defendant was fined five dollars upon conviction, a conviction later overturned by the Virginia Supreme Court. You have become, many years thereafter, a legislative representative for the Virginia Retail Merchants Association, and were associated with its counsel, Lewis F. Powell, Esq., later an Associate Justice of the United States Supreme Court, in promotion and drafting of later versions of the Virginia Sunday Closing Laws.

It would be useful for my dissertation which I am writing for a Master's Degree thesis in history at the University of Richmond, if you could confirm the above, with the qualifications above given showing your lack of direct involvement.

Sincerely,

WILLIAM R. VANDERKLOOT

Confirmed:


Sumpter Priddy, dated 4/16/2002
(copy of letter retained)

EXHIBIT

H

Cover Sheet for

Exhibit “I”

May 1942 Hanover County Criminal Docket

Showing *Commonwealth v. Francisco* “pending on motion.”

First Page of Discussion of the Exhibit in Thesis Text:

Page 171, footnote 106

EXHIBIT

1

HANOVER COUNTY CRIMINAL DOCKET

May, 1942

CASES PENDING FROM LAST TERM:

Commonwealth v. Walter McKinnon - not in custody *Nolle Pro.*
Commonwealth v. Glenn - five indictments - not in custody *Nolle Pro.*
Commonwealth v. Linwood Taylor - continued generally
Commonwealth v. William Johnson - not in custody
Commonwealth v. Norman Cracy - not in custody
Commonwealth v. Vernon Hall - fine to be paid May 16th *\$5.00 paid June 1 -*
Commonwealth v. Henry Crenshaw - not in custody
Commonwealth v. M. S. Eortz - execution issued vs. Dagenhart, bondsman
Commonwealth v. Francisco - pending on motion
Commonwealth v. Francisco
Commonwealth v. Nelson Goodman, Simon Luck and Herman Goodman
Commonwealth v. Raymond Taylor and William Thornton
Commonwealth v. Arthur Page
Commonwealth v. Arthur Page
Commonwealth v. William Thornton
Commonwealth v. Arthur Page and Raymond Taylor
Commonwealth v. William Thornton and John Mason

CASES APPEALED FROM THE TRIAL JUSTICE COURT:

Commonwealth v. J. H. Canady - *Forfeit bond - May 27-*
Commonwealth v. George R. Terry
Commonwealth v. William Johnson
Commonwealth v. Robert E. Martin *May July 2-*
Commonwealth v. Charlie Jackson
Commonwealth v. Harry Howard - *May 25-*
John Austin - July 3-

EXHIBIT

1

Cover Sheet for

Exhibit “J”

Commonwealth Attorney’s Motion *Nolle Prosequi* [dismissal]

of *Commonwealth v. Francisco*

in Hanover County [Virginia], Circuit Court

on September 20, 1943

Hanover County Common Law Order Book No. 19, Page 379

Hanover County, Virginia (1943)

First Page of Discussion of the Exhibit in Thesis Text:

Page 177, footnote 125

September 20th. 1943.

It appearing to the Court that it would have further use for the Grand Jury they are adjourned over until a later date.

EXHIBIT

J

The Tri-County Bank, Inc.

vs

ORDER

P. O. Gravatt and
Gaynelle Gravatt

This day came The Morris Plan Bank of Richmond, Central National Bank, of Richmond, and Southern Bank and Trust Company of Richmond and for answer to the garnishee summons herein issued against them severally answered as follows: That there is on deposit in The Morris Plan Bank of Richmond to the credit of the defendants the sum of \$67.57, in the Central National Bank to the credit of P. O. Gravatt \$248.17 and in the Southern Bank and Trust Company to the credit of the defendants \$575.92, which said sums are subject respectively to the lien of the sforesaid garnishee summons and the lien of the judgment herein;

Wherefore it is considered by the Court that the plaintiff do recover of the several defendants the moneys so held subject to said Garnishee, namely, of the Southern Bank and Trust Company \$575.92, of the Central National Bank \$248.17 and of The Morris Plan Bank of Richmond \$67.57; which said several amounts the said several defendants are ordered to pay to C. W. Taylor, Clerk, of this Court to be credited on said judgment.

It is further ordered that so soon as said sums are paid to C. W. Taylor, Clerk, shall pay therefrom all costs accrued and pay over the balance thereof to George E. Haw, Attorney for the plaintiff.

ENDORSEMENT:

I ask this.

Geo. E. Haw, Atty. for Plaintiff.

Collected from	
Morris Plan Bank	\$788
	248.17
Central Natl	67.57
Southern Bk & Tr	575.92
	\$891.66
Cost	4.60
Remitted to Mr Haw	
	887.0

EXHIBIT

J

Commonwealth

Vs.

Indictment for a Misdemeanor.

No. 1.

M. G. Francisco

Upon motion of the Attorney for the Commonwealth a Nolle Prosequi is entered in this case.

Commonwealth

Vs.

Indictment for a Misdemeanor.

No. 2

M. G. Francisco.

Upon motion of the Attorney for the Commonwealth a Nolle Prosequi is entered in this case.